Supreme Court, U.S.
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NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an em-

ployee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

4. Whether an appellate court can overturn a judgment for a plaintiff under the *New York Times Co. v. Sullivan* standard on the basis of testimony about editorial review which the trial judge, sitting as finder of fact, had found to be "wholly untrustworthy and ... not credible".

5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions Involved ...	6
Federal Rule of Civil Procedure Involved	6
Statement	7
Reasons for Granting the Writ	23
Conclusion	40

CITATIONS

Cases

Cantrell v. Forest City Pub. Co.,
419 U.S. 245 ..... 21, 23, 30, 31, 32
484 F.2d 150 30

Cher v. Forum International, Ltd.,
692 F.2d 634 ..... 25, 26

Dayton Board of Education v. Brinkman, 433 U.S. 406, 433 U.S. 526 28

Grausam v. Murphey, 448 F.2d 197 27

Herbert v. Lando, 441 U.S.153 29

Page

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 72 L.Ed.2d 606 ..... 21, 23, 24

Mayor v. Educational Equality League, 415 U.S. 605 28

New York Times Co. v. Sullivan, 376 U.S. 254 ..... 5, 14, 36, 38, 39

Pullman-Standard v. Swint, 72 L.Ed.2d 66 ..... 24, 28

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 22

St.Amant v. Thompson, 390 U.S. 727 ..... 22, 40

Time, Inc. v. Pate, 401 U.S. 279 39

United States v. General Dymanics Corp., 415 U.S. 486 29

Constitutional Provisions

U.S. CONST. Amend. I 6, 37

Amend. V 6, 35

Statutes

15 U.S.C. § 1121 8

28 U.S.C. § 1332(a)(1) 8

§ 1338 8

Page

Federal Rules of Civil Procedure

FED. R. CIV. P. 52(a) 4, 17, 22, 24, 25 26, 27, 28, 29, 39

Miscellaneous

Notes on Advisory Commitee Following Rule 52 25

Rules 34-54 U.S.C.S. Rules of Civ. P., Rule 52 27

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Bose Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 2, 1982.

Citations to Opinions Below

The opinion of the United States District Court for the District of Massachusetts on liability (A3-30)[1], App. X37-167, is reported in 508 F.Supp. 1249, 7 Media L. Rep. (BNA) 1069, and on damages (A31-37), App. X168-200, in 529 F.Supp. 357, 7 Media L. Rep. (BNA) 2481. The opinion of the Court of Appeals, App. X1-X36, is reported in 692 F.2d 189, 8 MEDIA L.REP. (BNA) 2391.

The opinion of the District Court denying respondent's motion for summary judgment is reported in 84 F.R.D. 682, 210 U.S.P.Q. (BNA) 645, 5 Media L. Rep. (BNA) 2404, in denying respondent's motion to dismiss in 181 U.S.P.Q. (BNA) 543, in certifying a question of state law to the Massachusetts Supreme Judicial Court

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[1] Reference to the appendix in the court below is to "A" page numbers. Reference to the separate appendix herein containing the lower court opinions is to "App." followed by "X" page numbers.

in 19 Fed. R. Serv. 2D (Callaghan) 442, and in requiring petitioner to plead special damages in 16 Fed. R. Serv. 2d (Callaghan) 1090. The opinion of the Massachusetts Supreme Judicial Court ruling that the filing of the complaint did not toll the statute of limitations for respondent's counterclaims is reported in 367 Mass. 424, 326 N.E.2d 8.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1982. A timely petition for rehearing suggesting rehearing *en banc* was denied on November 23, 1982, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of

FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an

employee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

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5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual

malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

Constitutional Provisions Involved

Congress shall make no law ... abridging the freedom of speech, or of the press ... . U.S. Const. Amend. I.

No person shall ... be deprived of ... property, without due process of law ... . U.S. Const. Amend. V.

Federal Rule of Civil Procedure Involved

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court

adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement

In the May 1970 issue of respondent's monthly magazine, *Consumer Reports*, respondent reported on a series of tests and measurements conducted by its engineers in an article entitled "Loudspeakers" (the Article). In addition to an evaluation of the quality and performance of 24 loudspeakers, represented as based on objective tests and measurements conducted by respondent's engineers, the Article reported on tests of petitioner's more expensive 901 loudspeaker system in a boxed-off section picturing the 901 system (A4-6). App. X46-50. Prior to publication of the Article, the Bose 901 system had received the best

reviews which ever had been given to a loudspeaker product (A364). App. X196.

After attempts to obtain a retraction failed, petitioner commenced this action to obtain relief for the harm caused by respondent's false and disparaging report on the Bose 901 system. Jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332(a)(1) on the Lanham Act, 15 U.S.C. § 1121 and 28 U.S.C. § 1338(a) and (b) (A3). App. X38-39.

After 19 days of trial during February, March and April 1980 before Senior District Judge Julian without a jury, the District Court found that petitioner had proved, by clear and convincing evidence, that respondent published a false statement of fact disparaging the Bose 901 system with knowledge that the statement was false or with reckless disregard for the falsity, holding respondent liable for product dis-

paragement as alleged in Count III of the complaint. The District Court ruled that petitioner did not sustain its burden of proof on Counts I and II of the complaint, based on common law tort liability and violation of section 43(a) of the Lanham Act, respectively (A30). App. X143-45. After two and a half days of trial on damages before Chief Judge Caffrey without a jury in June 1981, the District Court entered judgment for the plaintiff on February 8, 1982, for $210,905.64 in damages, interest and costs (A38). App. X1, X200.

The District Court found a number of representations made by respondent in the Article to be false or misleading but not damaging to petitioner (A13, A15), App. X70-71, X76-77, found a statement of opinion not actionable (A15), App. X80, and found that petitioner had not sustained its burden of proof with respect to other

statements (A17, A20) App. X85, X99.

The District Court found the statement in the Article, "Worse, individual instruments heard through the *Bose* system [by a "panel" of two engineers including the author of the statement] ... tended to wander about the room," to be a false and disparaging statement of fact which was damaging to petitioner (A21). App. X103-06.

Respondent's project engineer Seligson, who was in charge of the tests, wrote the original draft of the statement (A21), App. X103, and repeatedly checked the statement for accuracy before publication in the Article (A147). App. X32-33. The District Court said, "The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that 'tended to wander about the room.'" (A29 n.44) App. X168.

Both "panelists," Seligson and another engineer, Lefkow, who worked under Seligson, testified that the wandering sounds they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed (A20). App. X100. The District Court said, "Because such movement between two loudspeakers is a common effect [with all stereo loudspeaker systems] and is to be expected, a reader would not be surprised to read about 'instruments' moving along the wall between two loudspeakers." (A20) App. X101.

The two "panelists" allegedly made the tests on which the false statement was based on January 23, 1970, about three months before the Article was published, and recorded them on a little over a page in a laboratory notebook (PX9, Tr. 84,85[2],

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[2] We refer to petitioner's exhibits as PX and the trial transcript as Tr. followed by the pages where identified and offered, respectively.

A482-83). This laboratory notebook record fails to mention any moving instruments other than a violin or describe any comparative tests playing the same recordings through other speakers to determine whether the cause of the violin movement was the unidentified recording instead of the Bose 901 loudspeakers (A482-83).

"Panelist" Seligson testified that they tested three loudspeakers (A114, A116, A119), but "panelist" Lefkow testified that they tested only the Bose 901 system during this "special listening test." (A240-41, A253).

The District Court found that respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute that false claim by making demonstrations using the same recordings." (A36) App.

X194-95.

In a memorandum of respondent dated June 4, 1970 (PX33, A208, A224), of a meeting the day before with two representatives of petitioner, the following appears relative to the false and disparaging statement.

> ...Bose took extremely strong exception to the concept of wandering, and expressed the view that on theoretical grounds such an observation was patently impossible. There was some discussion on the philosophical considerations of subjective observations made that run counter to theoretical considerations. (After the meeting, WS [Walker Sandbach, then respondent's executive director] reported to MF [Monte Florman, respondent's technical director and the author of the memorandum] that CEW [Colston E. Warne, then respondent's president] felt that we were, in his opinion, weakest in our arguments about the wandering instruments. ...) (A487-88, A208-11).

The District Court found:

> Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers, testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wan-

dering instruments and the statement about gigantic power required." Tr. 2-144. Thus, the false statement that "individual instruments heard through the *Bose* system ... tended to wander about the room" cannot be considered a *de minimis* violation of the plaintiff's rights. (A21-22) App. X106-07.

After finding the statement false and disparaging, the District Court ruled that the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied to product disparagement cases, and that petitioner was a "public figure." The District Court therefore required petitioner to show with clear and convincing proof that respondent had published the false disparaging statement with the knowledge that it was false or with reckless disregard of its truth or falsity (A27). App. X132-33.

The District Court observed that petitioner did not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that the two engi-

neers of respondent who made up the "panel" alleged to have made the actual observations, must have known that the statement was false (A29). App. X140. In rejecting the profession of Seligson's good faith belief in the accuracy of the Article as written, the District Court said, "Because Seligson wrote the words upon which the false statement in the Article was based, it is his state of mind that is critical[44]." (A29) App. X140-41.

The District Court concluded, "After careful consideration of Seligson's testimony and of his demeanor at trial, the

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[44] The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room." App. X168.

Court finds that Seligson's testimony on this point is not credible." (A29) App. X142.

The District Court had previously ruled:

> The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded. (A20 n.33) App. X163 n.33.

The District Court ruled:

> ... the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. (A30) App. X143.

In reviewing and reversing the judgment of the District Court judges, the Court of Appeals held the statement to be disparaging and assumed that it was a false statement of fact. App. X19-21. After noting that petitioner did not dispute that it is a "public figure" with respect to the subject matter of the Article, App. X21, the Court of Appeals said:

> We focus, therefore, on the District Court's holding that Bose proved by clear and convincing evidence that CU published the words "individual instruments [heard through the *Bose* system] ... tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its

> burden of proof. ... At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact. App.X22-23.

Respondent had argued that the Court of Appeals "is not limited by the 'clearly erroneous' standard ... ." Brief for Appellant p.18.

The Court of Appeals observed:

> The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. ... A court typically will infer actual malice from objective facts. ... These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case. App. X27-28.

After stating, "CU's editorial procedures reveal no evidence of actual malice," App. X32, the Court of Appeals summarized the editorial procedures. This summary was based on the testimony of re-

spondent's Technical Director Monte Florman whose testimony had been found to be "wholly untrustworthy and ... not credible" by the District Court (A20 n.33). App. X163 n.33. Compare App. X32-34 with A201-02 and A220-22.

The Court of Appeals said:

> Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the Article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the Article--perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice. App. X34-35.

There had been no evidence that respondent's engineer wrote the false and disparaging statement in "an attempt to produce a readable article for its mass audience." The Dis-

trict Court said that the Article contained respondent's evaluation on the quality and performance of the loudspeakers based on respondent's tests of them (A5). App. X46.

The Court of Appeals observed that

> the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests--would support the position that the statements are factual. App. X18.

The Court of Appeals did not mention the rulings of the District Court on the credibility of respondent's witnesses Seligson (A29-30), App. X142, or Florman (A20 n.33), App. X163 n.33, under the heading "Our Review." App. X15-36. Under the heading "The Findings of the District Court," App. X8, it did state that the District Court "found that Seligson's testimony as to what the words 'about the room meant' was not credible." App. X14.

On November 14, 1982, petitioner filed a petition for rehearing, suggesting that it be *en banc*. Petitioner there urged that the standard of review discarding the "clearly erroneous" test under FED. R. CIV. P. 52(a) was directly in conflict with the recent decision of this Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L.Ed.2d 606 (1982). The petition for rehearing also urged that the Court of Appeals erroneously considered the state of mind of members of respondent's editorial staff instead of the state of mind of the author of the false statement, to reach a result contrary to that required by the controlling decision of this Court in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). The petition for rehearing also urged that the Court of Appeals based its conclusions upon testimony found by the trial judge to be not credible. Petition

pp.10-12.

The petition urged that the appellate court's task is to determine if there is "sufficient evidence to permit the conclusion", and not to draw its own conclusions from the evidence, citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 56 (1971). Although the Court of Appeals cited *Rosenbloom* in support of the conclusion that "we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a)," App. X22, it made reference to page 54 of that opinion instead of page 56, which quoted from page 731 of *St. Amant*.

In denying the petition for rehearing suggesting a rehearing *en banc*, the Court of Appeals said:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and

the editorial staff which reviewed and modified Seligson's report.

As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion [not limited to the clearly erroneous standard of FED. R. CIV. P. 52(a)] is correct and was properly applied. Order of November 23, 1982.

Although both *Inwood Laboratories* and *Cantrell* were cited to the Court of Appeals in both petitioner's original brief at pp.13, 36, and its petition for rehearing at pp.2, 3, 7, 8, 9, 11, 12, 13, neither of these decisions of this Court was mentioned by the Court of Appeals in its opinion or in its order denying the petition for rehearing.

Reasons for Granting the Writ

1. It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility

of the witnesses." FED. R. CIV. P. 52(a). *E.g. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ___ U.S. ___, 72 L.Ed.2d 606 (1982); *Pullman-Standard v. Swint*, ___ U.S. ___, 72 L.Ed.2d 66 (1982). In *Pullman-Standard* the Court said:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. 72 L.Ed.2d at 78-79.

In *Inwood* the Court further explained:

> That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. ... Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," ... it must accept the trial court's findings. (footnote omitted) 72 L.Ed.2d at 616.

In contrast, in the present case the Court of Appeals said:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead,

> we must perform a de novo review, independently examining the record to insure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof. App. X22-23.

Thus, the decision of the Court of Appeals is directly in conflict with these and other decisions of the Court, and with the "clearly erroneous" provisions which have been embodied in Rule 52(a) since the rules were adopted in 1938 to be in accord with the decisions on the scope of review in modern federal equity practice. See Notes of Advisory Committee on Rules following Rule 52.

The decision of the Court of Appeals in this case also is in conflict with a decision of the Court of Appeals for the Ninth Circuit in a case decided on November 18, 1982, *Cher v. Forum International, Ltd.*, 692 F.2d 634 (9th Cir. 1982). In *Cher* a defendant publisher had published

false statements relating to the plaintiff in advertisements, and claimed the protection of the First Amendment "in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth", 692 F.2d at 637. The trial court had found that the defendant "published the ads in question with knowledge that they were false or in reckless disregard for their truth." 692 F.2d at 639. The Court of Appeals held that there was sufficient evidence to support that finding, expressly applying the standards of FED. R. CIV. P. 52.

> Whether we agree with the trier's finding of knowing falsity, or fall back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd. 692 F.2d at 640.

There are many other lower court decisions following the "clearly erroneous"

standard for reviewing trial court findings when constitutional or civil rights are asserted. *E.g., Grausam v. Murphey*, 448 F.2d 197, 201 (3d Cir. 1971), *cert. dismissed*, 405 U.S. 981 (1972) and cases collected in Rules 34-54 U.S.C.S. Rules of Civ. P., Rule 52 n.96 (Law. Co-op 1974 and Cum. Supp. 1982).

While the Court of Appeals in the present case cited authorities after the "See" signal, including decisions of this Court, decisions of courts of appeals, and articles, App. X22-23, the decisions cited did not rule, nor did they imply, that a court of appeals is free to ignore the Rule 52(a) "clearly erroneous" standard of review. The departure by the Court of Appeals from the Rule 52(a) "clearly erroneous" standard of review represents such a marked departure from the accepted and usual course of appellate review of trial

court findings as to call for an exercise of this Court's power of supervision.

The Court of Appeals justified its departure from the "clearly erroneous" standard of review prescribed by FED. R. CIV. P. 52(a) as being necessary "to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." App. X22-23.

This ruling by the Court of Appeals is directly in conflict with *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) and 443 U.S. 526, 534 n.8 (1979), cited in *Pullman-Standard*, 72 L.Ed.2d at 79, and with *Mayor v. Educational Equality League*, 415 U.S. 605,621 n.20 (1974). There this court held that the "clearly erroneous" rule applies even when constitutional rights are asserted under the equal protection clause of the Fourteenth Amendment.

Rule 52(a) applies to this Court "just as fully on direct appeal to the court as when a civil case is being reviewed by a court of appeals." *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974). The departure from Rule 52(a) announced by the Court of Appeals is a decision on an important question of federal law having an impact on the appellate review of trial court findings in all cases where federal constitutional rights are asserted, and is squarely in conflict with applicable decisions of this Court. If the right of a plaintiff to obtain pretrial discovery of the author's state of mind for the purpose of proving actual malice is sufficiently important to justify review in this Court, *Herbert v. Lando*, 441 U.S. 153, 158 (1979), a fortiori the right of a plaintiff to have an appellate court accept a trial court's finding on the author's state of mind proving ac-

tual malice is sufficiently important to require review of this case in this Court.

2. In *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) the defendant had published an article containing false statements written by a reporter employee. The Court of Appeals reversed a judgment for the plaintiff on the ground that "there is no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities or in reckless disregard of whether or not it was true." 484 F.2d 150, 157 (6th Cir. 1973). This Court reversed the judgment of the Court of Appeals and remanded the case with directions to enter a judgment affirming the District Court judgment against both the reporter Eszterhas and the publisher. The Court said that

> there was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment at the Plain Dealer and that Forest City Publishing Co. was there-

fore liable under traditional doctrines of *respondeat superior*. 419 U.S. at 253.

In the present case the Court of Appeals examined in detail the sufficiency of the evidence to show that members of the editorial staff of respondent did not know the statement was false, App. X32-34, although the trial court found that the author of the statement knew that it was false, App. X142-43, and there was ample evidence to support that finding (A29-30). App. X139-43. This evidence was reviewed in detail in petitioner's brief below at pages 21-28, but the Court of Appeals did not mention it. Finding that the author's testimony to the contrary was not credible, the District Court found that at the time of the Article's publication the author knew that the false statement did not accurately describe the effects that he and the other of respondent's engineers had heard during the "special listening test."

(A29-30) App. X142-43.

Consistent with *Cantrell*, the District Court ruled, "Because Seligson wrote the words upon which the false statement was based, it is his state of mind that is critical[44]." (A29) App. X140-41. "The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that 'tended to wander about the room.'" (A29 n.44) App. X168 n.44.

The decision of the Court of Appeals in failing to accept these findings of the trial court, which were based on sufficient evidence, while focusing on the care exercised by the editorial staff of respondent in reviewing the false statement, is directly in conflict with *Cantrell*. *Cantrell* held that the author's knowledge of falsity, where the author was an employee of respondent, must be imputed to respondent as a

matter of law for purposes of applying the "actual malice" test. Here author Seligson was an employee of respondent and was found by clear and convincing evidence to have had knowledge that the false and disparaging statement was false when respondent published it.

3. Although the Court of Appeals said that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact," App. X23, the Court of Appeals failed to even mention the rulings of the trial court on the author's credibility in its review of the findings. App. X15-36. The trial court said, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible." (A29) App. X142.

The District Court concluded:

Based on the above finding that

> Seligson's testimony to the contrary is not credible, the Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments ... tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." (A30) App. X142-43.

By failing to accept this finding on the credibility of the author or the findings on the credibility of respondent's technical director (A20 n.33), App. X163 n.33, as witnesses and instead relying on the testimony of the latter, the Court of Appeals made such a departure from the accepted and usual course of judicial proceedings in which appellate courts accept the trial court's evaluation of the credibility of witnesses as to call for an exercise of this Court's power of supervision.

4. This departure by the Court of Appeals, in failing to accept findings on credibility of witnesses by the trial court, deprived petitioner of its compen-

satory damages in violation of the Fifth Amendment. Due process requires that a party to a trial without jury be entitled to have questions of credibility of witnesses resolved by the Article III trial judge who actually heard the witnesses testify and observed their demeanor. When the Court of Appeals did not accept the trial court findings on credibility of witnesses, it deprived petitioner of a property right without due process of law.

This point was not urged below because it arose only when the Court of Appeals ruled. The question is one that has not been, but ought to be, decided by the Court and vitally affects appellate rulings in all cases where a trial court rules on the cridibility and demeanor of witnesses.

5. The questions presented are of great importance in lending guidance to both publishers and persons damaged by the

publication of false statements in assessing their rights and liabilities. Whether a trial court finding based on proof by clear and convincing evidence from the mouth of an author who knowingly falsely disparaged a product can be overturned on appeal by disregarding the trial court's judgment on the credibility of the author as a witness vitally affects the degree of supervision a publication must exercise over its employees to avoid publishing a lie and the motivation of a publisher to retract a lie that has been published.

Whether *New York Times* is to be extended by authorizing a relaxed standard of appellate review of trial court findings to allow a magazine, which has ample time to check the accuracy of disparaging statements it proposes to publish, that publishes a false and disparaging statement known by its employee-author to be false,

to escape responsibility for the damage caused by that statement, is a question that has not been, but ought to be, decided by this Court. We submit that no responsible journalist claims a right under the First Amendment to lie. The instant case is therefore vitally important in delimiting the extent of constitutional rights to lie afforded by the First Amendment.

The importance of this case to many persons other than the parties involved is evidenced by the Court of Appeals receiving amicus curiae briefs on behalf of the Massachusetts Civil Liberties Union, Dow Jones & Company, Inc., The Dun & Bradstreet Corporation and the Magazine Publishers Association. Dow Jones publishes, *inter alia*, *The Wall Street Journal*, the nation's largest circulation daily newspaper, and *Barron's National Business and Financial Weekly*. It gathers and publishes business,

product, corporate and consumer information of public interest, some of which is critical of persons and products. Dun and Bradstreet publishes Dun's *Business Month* and about 30 other specialized business, technical and consumer magazines. Many of its publications evaluate, rate or review products, services or financial conditions. Brief of Dow Jones et al. as Amici Curiae in Support of Defendant-Appellant Urging Reversal of the Judgment Below at 5.

The Magazine Publishers Association (MPA), founded in 1919, represents 188 publishers of 800 different publications on numerous subjects including business, corporate, product and consumer information. The American people subscribe to about 250,000,000 copies of each issue of MPA member magazines. *Ibid.*

6. The Court of Appeals erroneously relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) in support of its ruling that it was not limited to the "clearly

erroneous" standard of Rule 52(a) in reviewing trial court findings, citing 376 U.S. at 285 and n.26 and *Time, Inc. v. Pate*, 401 U.S. 279, 284 (1971). App. X23.

The rationale for justifying a more stringent standard of proof for "hot news" publications like *The New York Times* and TIME may be justified on the limited ability of a daily newspaper or weekly newsmagazine under the pressure of deadlines to verify the accuracy of published statements. Whether these cases and their progeny should be extended to allow a magazine, which has months in which to verify, to escape liability by relaxing the "clearly erroneous" rule for appellate review on knowledge of falsity is a question of vital importance to publishers and to those damaged by the publication of knowingly false statements. None of these cases purported to usurp for appellate courts the right to

ignore rulings by trial courts on the demeanor and credibility of witnesses. We submit that the better policy is for appellate courts, whose judges did not observe the witnesses testifying, to follow the findings of the trial court judge, who observed the witnesses testifying, on credibility and demeanor. "The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 20 1983
Alexander L. Stevas, Clerk

82-1246

NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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INDEX

	Page
Court of Appeals Opinion	X1
District Court Liability Opinion ...	X38
District Court Damages Opinion	X169

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1230

BOSE CORPORATION

Plaintiff, Appellee,

v.

CONSUMERS UNION OF UNITED STATES, INC.,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Anthony Julian, U.S. District Judge)

Before

Davis*, Campbell and Bownes,

Circuit Judges.

Michael N. Pollet, with whom Marshall Beil, Carol A. Schrager, Karpatkin, Pollet, Perlmutter & Beil, Nancy Gertner, and Silverglate & Gertner were on brief, for appellant.

Blair L. Perry, with whom Hale & Dorr, and Charles Hieken were on brief, for appellee.

James F. McHugh, Jane E. Serene, Bingham, Dana & Gould, and John Reinstein, on brief for Civil Liberties Union of Massachusetts, amicus curiae.

Henry R. Kaufman, on brief for Dow Jones & Company, Inc., et al., amici curiae.

November 2, 1982

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* Of the Federal Circuit, sitting by designation.

Appendix

X1

BOWNES, Circuit Judge. This product disparagement case arises from an article evaluating the Bose 901 Series I stereo loudspeaker system by Consumer Reports, the monthly magazine of defendant-appellant, Consumers Union (CU). The district court found, in a bench trial limited to liability, that one statement in the article was false and was published with knowledge that it was false or with reckless disregard of its falsity. Bose Corp. v. Consumers Union of the United States, Inc., 508 F. Supp. 1249 (D. Mass. 1981) (Julian, J.). In a subsequent trial, damages were assessed in the amount of $115,296.00 plus interest and costs of $95,609.64. Bose Corp. v. Consumers Union of the United States, Inc., 529 F. Supp. 359 (D. Mass. 1981) (Caffrey, J.). CU

appeals both the finding of liability and the assessment of damages. We reverse on the issue of liability.

The Facts

Dr. Amar Bose founded the Bose Corporation in 1964 and is the corporation's principal owner and chief executive officer. CU conceded that he is an expert in the field of loudspeaker design.[1] Dr. Bose designed the Bose 901 in 1967, and it was first marketed late in that year or early in 1968. The shape and design of these loudspeakers were "unique and unconventional."

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[1] Dr. Bose received the degrees of Bachelor of Science, Master of Science, and Doctor of Science from the Massachusetts Institute of Technology (MIT). He coauthored a textbook entitled Introductory Network Theory and has been a faculty member in the Department of Electrical Engineering at MIT since 1956.

Bose, 508 F. Supp. at 1252. Each of the two loudspeaker cabinets in the system had the five-sided shape of a baseball home plate when viewed from above; one side in the front faced the listener and two sides in the rear faced away from the listener. The front face of each cabinet contained one driver[2] and each of the two rear faces had four drivers. As a result, the listener received one-ninth of the sound directly from the loudspeakers and eight-ninths of the sound by reflection off the wall behind the speakers.

Consumer Reports provides information about consumer products to mail subscribers and newsstand customers. At the time the

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[2] The drivers in a loudspeaker produce sound by physically displacing air.

article in question was published the magazine enjoyed "a very favorable reputation for independence, integrity, accuracy, and freedom from bias." Id. at 1252.[3] In the article, entitled "Loudspeakers," CU evaluated the quality and performance of twenty-four loudspeakers based on tests it had conducted. In a section boxed off from the main portion of the article and entitled "Some speakers of special interest," seven paragraphs of the eight-page article discussed the Bose 901. One other speaker, the Harmon-Kardon HD50, was also evaluated in this section.

The article explained the novel design

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[3] The district court found, and it was not disputed, that millions of readers relied on the magazine for product information and many would not make a substantial purchase without first consulting it.

of the Bose 901 as an attempt to simulate the sound patterns in a live concert hall, where listeners hear most of the sound after reflection off the walls and not directly from the orchestra. After describing the various components of the Bose system, the article next explained a test in which CU engineers compared the Bose 901 to another speaker[4] by using a special recording" of a cricket-like noisemaker moving from extreme left to extreme right." CU played the recording through the speakers in a listening room and "asked a panel to judge

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[4] This other speaker, the ADC 303AX, was evaluated in the main portion of the article and was one of only five "compact speakers tested (that) merited a check-rating." CU judged loudspeakers receiving this rating "to be relatively free of sound coloration and to have the best combination of wide sound ranges and smooth response."

the direction from which the sound appeared to come." CU concluded from this test that, "at least for pinpointing sharp noises, there appeared to be no difference between the speaker systems."

The next two paragraphs of the article described the results of a second test that CU performed on the Bose 901:

> We repeated the experiment using a variety of stereo sounds. When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.
>
> But after listening to a number of recordings, it became clear that the panelists could pinpoint the location of various instruments much more easily with a standard speaker than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be

> 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But, we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.

The article then discussed the sound quality of the Bose 901 and stated that if the speaker had been tested with the main group of speakers "it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality . . . (but) the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound." The article concluded that because the Bose 901 "is so unusual . . . a prospective buyer must listen to it and judge it for himself." It is noted that the Bose 901 "requires a

gigantic amount of power" and recommended "an amplifier of 50 watts per channel for the deepest base response."[5]

The Findings of the District Court

The court determined that under the applicable law of product disparagement,[6] it was the plaintiff's burden to prove that the statements made by CU were of a disparaging or defamatory nature and that the statements were false. After concluding that "the Article, when read as a whole is disparaging," the court proceeded to analyze

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[5] The stated figure in watts for each loudspeaker in the main group ranged from a high of 27 watts to a low of 4 watts, with only one speaker requiring more than 15 watts.

[6] The parties had agreed that the law of their respective states, Massachusetts and New York, was identical with respect to the elements of this tort. Thus, choice of law was not an issue.

in detail each alleged factual error in the article to determine if it was false and if it was disparaging. It found that although the use of the words "panel and panelists" was misleading because there were only two persons doing the testing, it was not disparaging. Bose's attack on the "sound quality" critique was rejected on the grounds that "it is nothing more than an opinion and, as such, it cannot be proved to be true or false," citing to Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). The court found that Bose had not sustained its burden of proof that the statement as to the power requirements of the system was false.

The district court's finding of liability was based on part of one sentence in the article which reads: "Worse, individual

instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." The court, in its analysis, divided the sentence into two parts. It found that the description "seemed to grow to gigantic proportions" had not been proven false but found the statement that the instruments "tended to wander about the room" was both false and disparaging. The evidence on which this finding was based is summarized as follows. CU's two employees who conducted the listening test "testified that the wandering sounds they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed." CU conceded that the words "about the room" might not have described the wandering with precise accuracy, but argued that the wandering

of sound was important to consumers, not where it wandered. CU maintained that the statement was substantially true because it accurately described the important observation. The district court referred to testimony that an amount of movement is expected with all stereo speakers and concluded that the location of the sounds' movement was as important to a consumer as the fact of movement. Thus, the court found the statement not to be substantially true. After rejecting CU's argument that the statements in the article about "a violin appear(ing) to be 10 feet wide and a piano stretch(ing) from wall to wall" modified the statements about wandering sounds to imply that the wandering occurred along the wall between the speakers, the court stated that the ordinary meaning of

"about" the room was "around" the room. The court found the statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product." The use of the word "worse" to introduce the statement in the article showed that CU intended it to have a harmful effect.

Having determined that Bose had proved by a preponderance of the evidence that the statement about individual instruments tending to wander about the room was false and disparaging, the district court proceeded to analyze the impact of the first amendment on the standard of care required of CU. It cited several lower court decisions and discussed the first amendment balance between

the need for an uninhibited press and the legitimate state interest in compensating victims of defamation in concluding that the actual malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964), applies to product disparagement cases. It then applied the analysis of Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), to conclude that "Bose is a public figure, at least with respect to the limited issues of the characteristics and quality of the Bose," and was required to show by clear and convincing proof that CU's false statement was published with knowledge that it was false or with reckless disregard of its truth of falsity. CU's project engineer, Arnold Seligson, conducted the listening test and wrote the words upon which the statements in the

article were based. Due in part to his demeanor at trial, the court found that Seligson's testimony as to what the words "about the room" meant was not credible. Seligson maintained that he perceived that the wandering sounds were confined to an area near the wall behind the loudspeakers. The court found that Seligson was too intelligent to not be aware of the ordinary meaning of "about" and thus concluded that Seligson knew at the time of publication that the article did not accurately describe the effects he had perceived during the test. In the court's view, this was clear and convincing proof that CU "published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity."

Our Review

As the parties acknowledge, the first amendment permeates our review. The question of the truth or falsity of the statement that individual instruments tended to wander about the room is intertwined with the question of whether that statement is one of opinion or fact; both questions are difficult to answer. CU argues that if the statement is considered in its full context it becomes clear that the statement is merely the opinion of the panelists who conducted the listening test. This full context i..cludes the tentative language that "instruments . . . seemed to grow" and "tended to wander," that "(w)ith orchestral music, such effects seemed inconsequential (although) we think they might become annoying when listening to soloists," and

finally that "the Bose system is so unusual that a prospective buyer must listen to it and judge for himself." CU cites numerous cases to support the proposition that a reviewer's published description of what he or she observed in a public performance, book, or restaurant is protected by the first amendment. Also, the Supreme Court has stated that "(u)nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (dictum) (footnote omitted). This statement of the Court implies that an opinion can be neither true nor false as a matter of constitutional law. The propo-

sition that an opinion can be neither true nor false also is reasonable as a matter of common sense.[7] The determination of whether a statement is one of opinion or fact, however, is difficult to make and perhaps unreliable as a basis for decision. Cf. W. Prosser, Law of Torts 820 (4th ed. 1971) (discussing the "unsatisfactory and unreliable" opinion limitation of common law and citing Titus, Statement of Fact Versus Statement of Opinion--Dispute in Fair Comment, 15 Vand. L. Rev. 1203 (1962);

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[7] Although perhaps a statement of opinion may be termed "false" if it is not genuinely an opinion held by the speaker. Cf. R. Sack, Libel, Slander and Related Problems 175-76 (1980). (The common law privilege of fair comment may be lost when an opinion "is not genuinely believed--a drama critic who pans a show because it has been produced by his hated brother-in-law . . . .")

Note, 62 Harv. L. Rev. 1207 (1949)).
Although CU's argument that the statement is an opinion is plausible, the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests would support the position that the statements are factual. See Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2nd Cir.), cert. denied sub nom. Hotchner v. Doubleday, 434 U.S. 834 (1977) (An expression of an opinion may become as damaging as an assertion of fact, and liability for libel thus attach, if the writer indicates that "he has private, firsthand knowledge which substantiates the opinions he ex-

presses . . . ."). Similarly, and stemming at least in part from the uncertain nature of the statement as one of fact or opinion, it is difficult to determine with confidence whether it is true or false. As the district court noted, at trial the CU panelists, Seligson and Lefkow, "testified that the wandering sounds that they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed." Given the subjective nature of a listener's perceptions and the imprecise language employed in the CU article, we are not sure that the statement that instruments tended to wander about the room is false.

Due to our ultimate conclusion that Bose has failed to meet its burden of proof with respect to actual malice, however, we will

assume that the statement was both factual and false and not explore further the intricacies of these concepts.[8] Before analyzing actual malice, we should first briefly note our agreement with the district court that the statement in question disparaged Bose 901 speakers. CU concedes that the statement told readers that the "movement of individual instruments is more pronounced and localization therefore more

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[8] Because we have assumed the falsity of the statement, we need not address CU's argument that a plaintiff must prove falsity with clear and convincing proof. One commentator has noted that this standard of proof might also apply to the determination of whether a statement is factual. See R. Sack, supra n.7, at 180 & n.139 ("If a plaintiff must prove falsity . . . it would follow that he has the burden of persuading the court that the statement is not opinion and therefore capable of being false." (emphasis in original)).

difficult with the Bose than with conventional speakers." The tenor of the paragraph that contained the statement was clearly that of criticism; this is highlighted by the use of the word "worse" to introduce the statement. There can be little question that the statement was disparaging.

At oral argument Bose acknowledged that it does not dispute the finding of the district court that the corporation is a public figure with respect to the subject matter of the CU article. Bose also conceded that the rule of New York Times v. Sullivan applies in this case, and thus accepted the district court's conclusion that the actual malice standard applies to product disparagement cases. As we have indicated earlier, the district court analyzed both of these issues

at length and we accept its conclusions for the purposes of this case. Cf. Long v. Arcell, 618 F.2d 1145, 1147 & n.2 (5th Cir. 1980) (plaintiffs bound by stipulation at trial that they were public figures when the article was written).

We focus, therefore, on the district court's holding that Bose proved by clear and convincing evidence that CU published the words "individual instruments . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitu-

tional law and that the plaintiff has indeed satisfied its burden of proof. See, e.g., New York Times v. Sullivan, 376 U.S. at 285 & n.26; Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Long v. Arcell, 618 F.2d at 1147; Hochner v. Castillo-Puche, 551 F.2d at 913; R. Sack, supra note 7, at 560 (citing New York Times v. Sullivan, 376 U.S. at 285 and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971) (plurality opinion)); Oakes, Proof of Actual Malice in Defamation Actions: An Unresolved Dilemma, 7 Hofstra L. Rev. 655, 663, 701, 707-09 (1979); Restatement (Second) of Torts Section 580A comment g (1977). At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

See Long v. Arcell, 618 F.2d at 1147; Oakes, supra, at 711.

In New York Times v. Sullivan, the Supreme Court held that in order to prevail in a defamation action a public official must prove "that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court extended this requirement of proof to public figures. The Court has formulated the actual malice standard as requiring a showing that the statement was made with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), and in another case as requiring "sufficient evidence to permit the

conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

A plaintiff required to prove actual malice under the New York Times v. Sullivan standard must do so with "convincing clarity." 376 U.S. at 285-86. This requirement, now the "clear and convincing proof" test, Gertz v. Robert Welch, Inc., 323 U.S. at 342; see Bruno & Stillman, 633 F.2d at 586 n.2, calls for the plaintiff to prove more than would be necessary under the preponderance of the evidence standard but something less than what the beyond a reasonable doubt standard requires. Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir. 1980); R. Sack, supra note 7, at 225.

Although these distinctions are fine, the standard of proof adopted reflects the value that society places on the underlying right involved. Cf. Addington v. Texas, 441 U.S. 418, 425 (1979) (discussing the clear and convincing proof standard in the context of the due process clause). The right of free speech and the concern about "the practical impact upon truthful speech"--which is "the whole point of the New York Times case," Oakes, supra, at 701 (quoting T. Emerson, The System of Federal Expression 536 (1970)--obviously are valued highly. We have noted in an earlier case "the almost decisive amplitude of 'breathing space' surrounding defamatory falsehood, once a plaintiff is obliged to meet the New York Times standard," as well as one commentator's conclusion that the rule in

that case "'in practical effect became a near-immunity from defamation judgments.'" Bruno & Stillman, 633 F.2d at 686 (quoting Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1373 (1975)).

The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. See Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 868, 330 N.E.2d 161, 173 (1975). A court typically will infer actual malice from objective facts. Oakes, supra, at 666-67 (quoting Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1965), cert. denied, 385 U.S. 1011 (1967)). These facts

should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case.

It is helpful to compare the research and editing procedures followed by CU in publishing its article on loudspeakers with publishers' procedures that have been examined in other cases. One court, in finding that the plaintiff--a public figure--had failed to show actual malice, reviewed CU's work in publishing a series of articles in 1978 attacking the claims of certain organizations and individuals that fluoridization causes, among other things, cancer and birth defects. Yiamouyiannis v. Consumers Union of the United States, Inc.,

619 F. 2d 932. It stated:

> It is clear that appellee, through its agents, made a thorough investigation of the facts. Scientific writings and authorities in the field were consulted; authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism: the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.

Id. at 940. Although we would refrain from describing CU's loudspeaker article as exemplifying the very highest order of responsible journalism, CU does not have to meet such high standards to prevail. In addition, these two CU projects are distinguishable. In the fluoridization article there existed an abundance of scientific research and writing which CU merely cited

in drawing its conclusions. In the instant case, CU had the much more difficult task of performing the original research.

It is important to point out that in conducting the listening test CU used experts, Seligson and Lefkow,[9] who brought their expertise and experience to bear in evaluating the Bose speakers. In Reliance

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[9] One of the panelists, Seligson, was the senior project engineer on the project. He had a bachelor's degree in electrical engineering and had taken some courses toward a master's degree in electrical engineering. He also had taken another course in acoustics. Seligson had four years of experience with the U.S. Naval Materiel Laboratory, where he devoted much of his time to measuring and evaluating loudspeakers. Except for a two-year stint with another corporation, he has worked for CU since 1961, becoming a senior project engineer in 1963 and the chief of CU's Electronics Division in 1974. The district court noted that as of the time of trial Seligson had more than twenty-five years of experience testing and evaluating loudspeakers. The other panelist, Lefkow, was a

Insurance Co. v. Barron's, 442 F. Supp. 1241 (S.D.N.Y. 1977), the court noted the expertise of the author and granted a motion for summary judgment because there was no triable issue of fact that the article was published with actual malice. Id. at 1350-51. The Second Circuit found lack of expertise to be evidence of malice in Goldwater v. Ginsburg, 414 F.2d 324 (2d Cir. 1969). The court affirmed a jury finding of actual malice in an article stating that Senator Goldwater suffered from the mental disease of paranoia. The court noted that this conclusion "was

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project engineer who had just joined CU prior to the loudspeaker project. He held bachelor's and master's degrees in electrical engineering.

reached only upon his (the author's) own non-expert evaluation of Senator Goldwater's life and political career." Id. at 331.

Some evidence of actual malice may be found "if there is a complete departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Reliance Insurance, 442 F. Supp. at 1341. CU's editorial procedures reveal no evidence of actual malice. As in Reliance Insurance, the testimony in this case indicated that normal editorial procedures were followed; there was no evidence of CU knowingly departing from these procedures in order to publish the article regardless of its truth or falsity. After testing the loudspeakers, Seligson prepared a rough draft of the manuscript, commonly

referred to as a "report to editorial," which was reviewed by an associate technical director. The Editorial Department then reviewed this report and drafted the manuscript for publication. Among other editorial alterations, the Department changed Seligson's words that instruments "suffered (from) a tendency to wander around the room" to the statement ultimately published that instruments "tended to wander about the room." This manuscript was sent back to Seligson for "line by line checking" and then forwarded to the associate technical director for his review. It was then returned to the Editorial Department. These same procedures were applied to galley proofs, second galley proofs, page proofs, and second page proofs. The associate technical director

testified that when he performed his reviews the words "tended to wander about the room" conjured up "the mental image . . . of the sound moving about in front of the listener." He also testified that when he approved the article for publication he never really pondered the meaning of the word "about" in the statement. The most we can conclude from this is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise language being used.

Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was

false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the article--perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice. See Wolston v. Reader's Digest Ass'n, 578 F.2d 427, 434 (D.C. Cir. 1978); cf. Lambert v. Providence Journal Co., 508 F.2d 656, 659 (1st Cir. 1975) (discussing "the court's reluctance to entertain libel suits dependent upon a precise construction of a newspaper's use of technical legal terminology"); R. Sack, supra, at 175 ("'mere exaggeration, slight irony or wit,

or all of those delightful touches of style that go to make an article readable, do not push beyond the limitations of fair comment'" (quoting Briarcliff Lodge Hotel, Inc., 260 N.Y. 106, 118, 183 N.E. 193, 198 (1932)). To find actual malice in this case would be to interpret that concept to require little more than proof of falsity, an interpretation that Justice Goldberg expressed fears about in his concurrence in New York Times v. Sullivan. 376 U.S. at 298 n.2 (Goldberg, J., concurring).

Due to our holding on the issue of liability, there is no need for us to review the district court's findings on damages.

Reversed.

CAMPBELL, Circuit Judge (concurring).

In joining as I do in the court's opinion,

I wish merely to emphasize my understanding that this court is in no way passing upon the actual merits of the district court's finding that Bose Corporation was a public figure.

Adm. Office, U.S. Courts - Addison C. Getchell & Son, Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

BOSE CORPORATION,
Plaintiff

v.

CIVIL ACTION
NO. 71-481-J

CONSUMERS UNION OF U.S., INC.,
Defendant

O P I N I O N
January 21, 1981.

JULIAN, Senior District Judge

The plaintiff, Bose Corporation (Bose), a manufacturer of loudspeaker systems and other audio equipment, brought this civil action in 1971 against the defendant, Consumers Union of United States, Inc. (CU), a consumer product-testing organization, alleging product disparagement, unfair competition, and violation of Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a)(1976). Jurisdiction was based on diversity of citizenship, 28 U.S.C.

Section 1332(a)(1), and on the Lanham Act, 15 U.S.C. Section 1121 and 28 U.S.C. Section 1338(a) and (b). The lawsuit was precipitated by the publication of a review of the plaintiff's product, the Bose 901 Series I loudspeaker system, (the Bose 901), which appeared in the May 1970 issue of the defendant's publication, Consumer Reports.

After an exceedingly protracted period of pretrial discovery[1] the Court severed the issue of damages from the other issues in the case and ordered that a trial be held on the issue of damages only if the plaintiff prevails on the remaining issues. The Court then conducted a non-jury trial which concluded after nineteen days of testimony.[2] This opinion constitutes the Court's findings of fact and conclusions of

law as required by Rule 52 of the Federal Rules of Civil Procedure. Further findings of fact and conclusions of law on the issue of damages will be made after the trial on damages is held.

THE PARTIES

Plaintiff

The plaintiff, Bose Corporation (Bose), is a corporation organized under the laws of the State of Delaware and having its principal place of business in Framingham, Massachusetts. It was organized in 1964 under the laws of the Commonwealth of Massachusetts and became a Delaware corporation by merger in December, 1978. When this action was commenced on February 23, 1971, the plaintiff was a Massachusetts corporation and had its principal place of business in Natick, Massachusetts.

Dr. Amar G. Bose (Dr. Bose) is the founder, principal owner, and chief executive officer of the plaintiff corporation. The name of the plaintiff corporation is derived from the surname of Dr. Bose. Dr. Bose is also the inventor of the Bose 901, the product involved in this action.

Dr. Bose received his Bachelor of Science degree and his Master of Science degree from Massachusetts Institute of Technology (M.I.T.) in 1952 and his Doctor of Science degree from the same institution in 1956. He has been a member of the faculty of M.I.T. in the Department of Electrical Engineering since 1956. He is the co-author of a textbook entitled Introductory Network Theory. For the purposes of this action the defendant concedes that he is an expert in the field

of loudspeaker design.

The Bose 901 system was designed by Dr. Bose in 1967. The system consists of two loudspeaker cabinets, an electronic device called an "active equalizer," and necessary wiring and connections. Each of the cabinets is of pentagonal shape when viewed from above, being designed to have one side (the front face) facing toward the listener and two other sides (the rear faces) facing away from the listener. The two rear faces join at an angle in the rear of the cabinet to form a "V". The front face contains a single driver.[3] Each of the two rear faces contains four drivers. The nine drivers are of equal size. Because of this configuration of drivers within the Bose 901 cabinets, each Bose 901 loudspeaker radiates one-ninth of the sound directly

into the listening area, and eight-ninths of the sound into the listening area after reflection off one or more walls. The shape of the Bose 901 cabinets and the design of the Bose 901 system as a whole are unique and unconventional.

The Bose 901 was first marketed in late 1967 or early 1968. In 1968 Bose began to advertise and extensively promote the Bose 901. Bose published advertisements promoting the Bose 901 in the national consumer high fidelity magazines[4], in national general publications[5], and in other publications.

A significant portion of the Bose marketing efforts was directed toward soliciting reviews of the Bose 901 by professional reviewers. Bose obtained the right to reprint such reviews and dis-

tributed reprints of the reviews as part of its promotional campaign.[6]

Defendant

The defendant, Consumers Union of United States, Inc. (CU), is a not-for-profit corporation organized and existing under the laws of the State of New York and having its principal place of business in Mount Vernon, New York. CU was organized in 1935. When this action was commenced, CU had its principal place of business in Mount Vernon, New York.

From May 1936, to date, CU has published a magazine called Consumer Reports, in which information about the quality, characteristics, and prices of various consumer products is set forth. At all times relevant to this action, Consumer Reports has been published on a monthly

basis. Consumer Reports is distributed by mail to subscribers and is sold on newsstands.

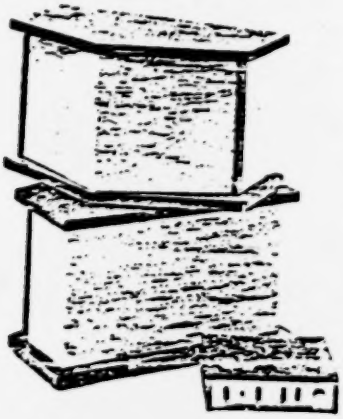
The influence of Consumer Reports on consumers' buying decisions is substantial. During 1970 and 1971 Consumer Reports and CU had a very favorable reputation for independence, integrity, accuracy, and freedom from bias. Subscribers to Consumer Reports tend to make buying decisions relative to consumer products after consulting reports published in Consumer Reports, among other sources, and in 1970 millions of readers relied upon the product information published in the magazine. Many consumers would not think of making a substantial purchase without consulting Consumer Reports.

The Consumer Reports Article

On pages 272 through 279 of the May 1970 issue of Consumer Reports CU published an article entitled "Loudspeakers" (the Article). The Article contained CU's evaluation of the quality and performance of twenty-four different loudspeakers based on CU's tests of the loudspeakers. In a section (the Bose 901 Portion) boxed off from the main body of the Article, under the heading "Some loudspeakers of special interest," appeared the following comments about the Bose 901:

> Some loudspeakers of special interest
>
> **BOSE 901. No loudspeaker design has ever really captured the realism of live concert hall sound, although many designers have tried. The Bose 901 system (The Bose Corp., Natick, Mass.) takes an interesting shot at realism. The concept behind the Bose system is**

based on the contention that in an actual concert hall most of the sound you hear has been bounced from the walls; it does not come directly from the orchestra. Therefore, the Bose 901 speaker system directs only about 10 per cent of its output toward the listener and bounces the other 90 per cent from the wall. The Bose 901 system comes as a package with two speaker systems and an electronic equalizer that can be easily connected to your amplifier. The package is priced at $476 ($496 on the West Coast).



Each speaker cabinet contains nine small (five-inch), speakers. Small speakers tend to reproduce high frequencies more efficiently than low frequencies. But so many speakers together in each cabinet help to reinforce bass tone, and help to disperse the sound more evenly. The

electronic equalizer is intended to further compensate for the relatively low bass efficiency of small speakers, to compensate for the loss of treble when sound is reflected from the walls, and thus to help provide a uniform overall response. The active equalizer can be adjusted, within limits, to vary the sound to individual taste.

To determine what effect the system has on stereo reproduction, CU's engineers made a special tape, in the anechoic chamber, of a cricket-like noisemaker moving from extreme left to extreme right. We played the tape through the Bose system in our listening room and asked a panel to judge the direction from which the sound appeared to come. For comparison, the panel also listened to the same tape through a pair of ADC 303AX speakers, checkrated in the accompanying report. The panelists were able to locate the sound accurately from both the ADC and Bose systems when they sat directly between the speakers, but not when they sat at either the extreme left or extreme right. So, at least for pinpointing sharp noises, there appeared to be no difference between the speaker systems.

We repeated the experiment using a variety of stereo records. When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of

giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise they too acquired the same spacial openness and size distortions as the stereo records.

As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.

We think the Bose system is so unusual that a prospective buyer must listen to it and judge it for himself. We would suggest delaying so big an

> investment until you were sure the system would please you after the novelty value had worn off. If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response.

A brief summary of the Bose 901 Portion of the Article was published by CU in the December 1970 "Buying Guide Issue" of Consumer Reports.[7]

CU Personnel

The testing project that led to the publication of the Article involved a number of CU personnel, but the persons who were primarily responsible for the Bose 901 Portion of the Article were Arnold L. Seligson and Alan Lefkow. Seligson was the senior project engineer on the loudspeaker testing project and Lefkow worked as a project engineer under the immediate supervision of Seligson.

Seligson received a bachelor's degree in electrical engineering from the City College of New York in 1957. He took additional courses leading toward a master's degree in electrical engineering during the years 1953-1956, but discontinued his studies for personal reasons and never attained a master's degree. He also took a course in acoustics at Brooklyn Polytechnic Institute in 1953.

From 1952 to 1956, Seligson worked for the United States Naval Laboratory, where much of his work involved measurement and evaluation of loudspeakers. In July 1956 Seligson was employed by CU as a project engineer. In 1961 he left CU to work for another corporation. He returned to CU in 1963 as a senior project engineer and remained a CU employee to the time of trial.

Seligson became chief of CU's electronics division in 1974 and held that position at the time of trial. While an employee of CU, Seligson has done extensive work on testing of loudspeakers. He has been testing and evaluating loudspeakers for more than 25 years.

Alan Lefkow was first employed by CU at the end of September 1969, just before the loudspeaker testing project began. He was employed as a project engineer in the electronics division and worked on the loudspeaker testing project under Seligson's supervision. Before joining CU Lefkow had received a bachelor's degree in electrical engineering from the City College of New York in 1965 and a master's degree from Columbia University in the same field in 1968.

CU's Expert Witness

Dr. David M. Green testified as an expert witness for CU. Dr. Green is the Chairman of the Department of Psychology and Social Relations at Harvard University, where he is a professor of psychophysics. He received a bachelor's degree in liberal arts from the University of Chicago in 1952, a bachelor's degree in psychology from the University of Michigan in 1954, and a doctoral degree in psychology from the University of Michigan in 1958. He has taught courses in psychoacoustics at various universities; is the author of a large number of publications in the field of psychoacoustics; has written a text book entitled An Introduction to Hearing; is the president-elect of the Acoustical Society of America; and was acknowledged by the

plaintiff to be an expert in the field of psychoacoustics.[8]

The Loudspeaker Tests

CU's loudspeaker testing project began in the spring of 1969 with the preparation of three marketing reports by CU's Marketing Services Department. These reports were used in selecting the loudspeakers which were to be tested. A total of twenty-four of the loudspeakers listed in the marketing reports were eventually selected for testing.

The primary purpose of the loudspeaker project was the evaluation of medium-priced loudspeakers, generally those with a retail price of from $80 to $150 per speaker. The Bose 901, which consisted of two loudspeaker cabinets and an active equalizer, was priced at $476 and was thus not a

medium-priced loudspeaker system. Nevertheless, Seligson and other CU employees decided to include the Bose 901 in the testing project because of the wide reputation it had achieved in the industry and because of the unusual claims made on its behalf by its manufacturer. Seligson was directly involved in the initial discussions concerning the inclusion of the Bose 901 in the testing project. Seligson also completed a "Test Sample Requisition" to be prepared for the purchase of several loudspeakers, including the Bose 901. The decision to include the Bose 901 in the testing project required the approval of Seligson's superiors -- Karl Nagel, Chief of the Electronics Division; Monte Florman, acting (associate) technical director, and John Hanc, head of the Marketing Services

Department. Seligson expected that the "Test Sample Requisition" which he had prepared would, in the normal course of events, be approved and it was in fact approved by Seligson's superiors.

The loudspeaker tests that provided the basis for the evaluations made in the Article began in September 1969. Seligson was in charge of the testing and planned the tests. He did some of the testing work himself, and supervised the work of Lefkow and two assistant project engineers who were assisting in the testing work. When the testing was completed, Seligson analyzed the results and prepared, with Lefkow's assistance, a report to CU's editorial department which report formed the basis of the Article.

Each of the twenty-four loudspeakers

was put through a basic battery of tests. The loudspeakers were first put through a number of "objective" tests and measurements.[9] They were subjected to an "A-B listening test," a test which was designed to evaluate the "accuracy" of the loudspeakers. The "A-B listening test" was described in the Article as follows:

> To supplement the quantitative measurements we made of the loudspeakers in the anechoic chamber and the listening room, we put each speaker through a carefully designed listening-panel test. We first selected a speaker we knew provided a wide, smooth frequency response; that became the "reference speaker." We played a wide variety of music through that speaker in the anechoic chamber and recorded the output of the speaker on one track of a master tape. At the same time, we recorded the music directly on the second track of the master tape, without playing it through the speaker.
>
> The reference speaker was then set up in the listening room, hidden from view of the listening panel. The music recorded on the second track of the

master tape (that is, the music recorded directly from the source) was played through the reference speaker. The speakers under test were set up two at a time, also out of view of the panelists.

The music recorded from the first track of the master tape (that is, the music recorded from the reference speaker) was played through the speakers under test. Under those conditions, then, a test speaker that reproduced music with absolute fidelity would sound exactly the same as the reference speaker.

The panelists were asked to judge which one of the two test speakers produced a sound that was, overall, closer to that of the reference. (We could, of course, switch back and forth between the reference speaker and the test speakers almost instantaneously.) The listeners were told emphatically not to base their judgments on which speaker seemed "better" for music or which they "liked" better, but merely to say which was more faithful to the reference sound. At the same time, by asking the listeners to match the loudness of the speakers under test, we determined the amount of average sine-wave power required for each speaker to produce the same loud sound in a 3000-cubic-foot room. That figure provided a good comparison of the effective relative efficiency of the speakers.

CU's statistical analysis of the results of the A-B listening test revealed that the Bose 901 should be ranked in the "middle accuracy group" of loudspeakers. Because he felt that the results of this test were unfair to the Bose 901[10], Seligson placed the Bose 901 "between the high- and medium-accuracy groups."

After the objective tests and the A-B listening test were conducted, the Bose 901 was subjected to two additional "special tests."[11] The first "special test," the cricket test, was described in the May 1970 Consumer Reports Article as follows:

> To determine what effect the system has on stereo reproduction, CU's engineers made a special tape, in the anechoic chamber, of a cricket-like noisemaker moving from extreme left to extreme right. We played the tape through the Bose system in our listening room and asked a panel to judge the direction from which the

> sound appeared to come. For comparison, the panel also listened to the same tape through a pair of ADC 303AX speakers, check-rated in the accompanying report.

It was Seligson's idea to conduct the cricket test and it was Seligson who designated the Bose 901 for inclusion in the cricket test.[12]

The second "special test," the "special listening test," was also Seligson's idea. The "special listening test" consisted simply of Seligson and Lefkow recording their personal observations after listening for several hours to a variety of records played through the Bose 901. Seligson selected himself and Lefkow to be the "panelists" for the "special listening test" because he felt they would be the appropriate parties to make the subjective judgments that were called for by this test.

The Seligson Patent

In the summer of 1964, Seligson conceived of an idea for utilizing an electrical discharge in order to produce sound. He envisioned the primary application of his idea to be a device which could be used as a loudspeaker.[13] In the fall of 1964 Seligson and Robert S. Lanier, a fellow CU employee, began work on the development of a loudspeaker using Seligson's idea. They built several models of the loudspeaker and discovered that the concept worked. Their models produced audible sound. The sound, however, was produced at very low levels, was distorted, and was accompanied by the production of ozone when the models were in operation.

In late 1964, Seligson and Lanier decided to attempt to obtain a patent on

the new loudspeaker and retained a patent attorney named Robert W. Fiddler for that purpose. They called their invention the "Ionoflow Loudspeaker," and in describing it to Fiddler, Seligson wrote:

> "Above all, the Ionoflow can, we believe, be made into the first truly full-range, high efficiency, low-distortion speaker in a fairly (sic) small form."[14]

Seligson believed that language to be an accurate description of the invention at the time.

An application for a patent on the invention was signed by Seligson and Lanier on April 8, 1966, and filed in the United States Patent Office on April 26, 1966. At that time Seligson still thought that his invention might have commercial potential despite its problems of inadequate sound volume, distortion, and ozone production.

Seligson did not work on the invention at all from 1967 until spring of 1970. He was discouraged by the problems encountered in building a good, working model and became gradually disillusioned about the prospects of future commercial exploitation of his idea.

On May 5, 1969, Fiddler wrote to Seligson to inform him that notice had been received from the United States Patent Office that a patent would issue on the application. On November 4, 1969, during the same period of time CU was conducting its loudspeaker tests, United States Patent No. 3,476,887 was issued to Seligson and Lanier for their "Ionic Electro-Acoustic Transducer."

In April 1970 Seligson learned that Lanier had been approached by a man named

Bertram Menden, who sought on behalf of a third party to acquire a license or rights under the patent. Menden was in reality a private detective retained by Bose to inquire into matters relating to the patent. Seligson obtained permission from Florman to enter into an agreement with Menden and then signed such an agreement (the Menden Agreement). He understood that the Menden Agreement granted to Menden or his undisclosed principal a right of first refusal for a license under the patent. Menden then paid $2,000 to Seligson and Lanier, which, under the terms of the Menden Agreement, was to be used only for the purpose of building a model of the invention. When Seligson and Lanier accepted the payment of $2,000, Seligson intended to build a model of the invention for Menden, and he

and Lanier worked hard to do so. Seligson understood that if the model were satisfactory, Menden might seek a license under the patent. Despite their hard work, Seligson and Lanier were unable to complete a model because they ran out of funds prior to completion of the amplifier and power supply, an essential part of the device.

Report to Editorial

Around the end of January 1970, after completion of the loudspeaker testing, Seligson and Lefkow prepared a draft "Report to Editorial" for use by the editorial department in preparing a manuscript of the Article. The portions of the "Report to Editorial" which dealt with the Bose 901 were drafted entirely by Seligson.[15] After review by Seligson's superiors the draft was forwarded to the editorial

department. The Bose 901 Portion of the Article was based on the material written by Seligson in the "Report to Editorial."

Product Disparagement

The complaint in this case alleges a claim for relief for product disparagement.[16] In cases such as this, where the plaintiff is a corporation, product disparagement is sometimes confused with the closely related tort of corporate defamation. Conceptually the two torts are easily distinguishable. Defamation of a corporation injures the reputation of the corporation itself, while product disparagement injures the reputation of its products. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902).[17] In practice, however, the line

between the two torts is often blurred because comments that disparage a product almost invariably reflect adversely on the manufacturer of the product as well. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); W. Prosser, Law of Torts Section 128, at 918 (4th ed. 1971).

The distinction between the two torts must be drawn because there are important differences in their required elements of proof. Both torts require proof of the publication and of the disparaging or defamatory nature of the statements involved. W. Prosser, Law of Torts Section 128, at 920 (4th ed. 1971). In an action for product disparagement, however, a plaintiff must prove that the offending statements are false, Swan v. Tappan, 59 Mass. 104 (1850); Marlin Firearms Co. v.

Shields, 171 N.Y. 384, 64 N.E. 163 (1902), whereas in an action for corporate defamation, falsity is presumed and truth is a defense which must be proven by the defendant. Restatement (Second) of Torts Section 581A, Comment b (1977). In addition, if the action is for product disparagement, the plaintiff must allege and prove special damages -- specific proof of pecuniary loss -- before being entitled to recover. Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902). Until recently,[18] at least, damages were presumed in an action for corporate defamation. Restatement (Second) of Torts Section 569 (1977).

It follows that because this is an action for product disparagement, the

burden is on the plaintiff to prove that the statements made by CU were false and to prove the existence and amount of special damages. The Court severed the issue of damages from the other issues in this case, but not before the plaintiff made a minimal showing that it could produce evidence of special damages.

CU urges that, before dissecting each statement contained in the Bose Portion of the Article, the Court should read the entire Article. According to CU, the Article, when read as a whole, is not disparaging at all, but complimentary to the Bose 901. The Court does not accept this characterization. The Article contains some statements that might be interpreted as complimentary,[19] but the effect of that language is more than

outweighed by other statements that are clearly critical[20] of the Bose 901. The Court concludes that the Article, when read as a whole, is disparaging.

The plaintiff claims that there are numerous factual errors in the Bose 901 Portion of the Article. In the following paragraphs each of the alleged factual errors will be discussed in turn, with regard to whether the statement is in fact false and with regard to whether the statement is disparaging.

"Panels"

The words "panel" and "panelists" appear throughout the Article, especially in the Bose 901 Portion. The Article does not explain, however, that there were in fact three different panels involved in testing the loudspeakers -- the "A-B

listening test" involved a panel of five CU employees, the "cricket test" utilized a panel of two CU employees, and the "special listening test" involved only Seligson and Lefkow. The plaintiff claims that CU's use of the words "panel" and "panelists" without explaining that three different panels were involved was misleading. It was also misleading, according to the plaintiff, for CU to use the word "panel" when referring to only two people. Seligson himself testified that the use of the word "panel" to describe two persons could be "possibly a mite misleading." Tr. 9-89.

While the Court agrees that CU's use of the words "panel" and "panelists" was misleading to the readers of the Article, it is difficult to see what harm such misleading use of terms caused the plaintiff.

The misleading use of the words "panel" and "panelists" simply does not disparage the Bose 901.

Equalizer Function

The Bose 901 Portion of the Article said the following with regard to the Bose 901 active equalizer:

> The electronic equalizer is intended to further compensate for the relatively low bass efficiency of small speakers, to compensate for the loss of treble when sound is reflected from the walls, and thus to help provide a uniform overall response. The active equalizer can be adjusted, within limit, to vary the sound to individual taste.

At trial the plaintiff contended that this statement was false. However, the plaintiff has represented that it no longer relies upon this asserted factual error as a basis for relief in this action[21] and the Court will disregard it.

Sound Quality

The following statement was made in the Bose 901 Portion of the Article:

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups.

The main body of the Article states:

> Over the years, CU has constantly refined its testing methods and examined repeatedly the relationship between measurable factors and listeners' judgments on quality. From such studies, we arrived at two conclusions. First, loudspeaker quality, as the listener finds it, can be measured in the lab, but only roughly--to divide speakers into broad quality groups of the kind used in our Ratings.

The plaintiff reads the two foregoing statements as implying that the Bose 901 had been subjected to careful, objective tests and measurements which had resulted in its being ranked below the "High Accuracy" loudspeakers. According to the

plaintiff, none of the tests that were performed on the loudspeakers to determine their accuracy were objective at all, and, even if they could be considered objective, they were not performed on the Bose 901. Thus, the plaintiff contends, CU misled its readers into thinking that the sound quality of the tested loudspeakers, including the Bose 901, had been carefully and objectively measured and that the sound quality of the Bose 901 had been found lacking in some respects. The facts giving rise to the plaintiff's claim are as follows.

The "accuracy" ratings were derived in part from the "objective tests" that were performed on the loudspeakers. A "roughness index," a "spectrum index," and a "low frequency index"[22] were determined for

each of the conventional loudspeakers.[23] These three indices were then multiplied together to determine a score for each loudspeaker. After a score was determined for each loudspeaker, Seligson applied his own subjective judgment to alter the scores because he felt "the objective scores did not reflect the true standing." Tr. 10-127. The final rankings of the conventional loudspeakers which appeared in the Article reflect the scores as altered by Seligson.

The Bose 901 and the Harman-Kardon HK-50 loudspeakers were never scored in this fashion because they were unconventional loudspeakers. The technique for evaluating the objective data generated by such unconventional loudspeakers was beyond CU's capabilities at the time. Therefore, none of the three indices was determined

for the unconventional loudspeaker. Nevertheless, the Article made the following statements about the unconventional loudspeakers.

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups.
>
> Our judgment of the overall sound quality of the Harman-Kardon HK50 would place it in the lower section of the medium-accuracy group. Its sound was distinctly hollow and muddy.

The Court agrees with the plaintiff that the Article implies that the accuracy of the tested loudspeakers was determined in an objective fashion. CU's statement that "(l)oudspeaker quality . . . can be measured in the lab . . . ," creates the impression that such measurements made in a laboratory are objective ones, rather than the type of subjective judgments made by

Seligson. The Court also agrees that the foregoing implication was false. The fact that objective scores were determined is of little consequence in view of the fact that Seligson subsequently altered those objective scores to conform to his subjective judgments. In addition to the fact that the tests that were performed on the conventional loudspeakers lacked objectivity, no objective scores at all were determined for the Bose 901 or for the HK-50 loudspeaker.

Standing by itself, however, the false implication that the accuracy of the tested loudspeakers was determined in an objective manner does not entitle the plaintiff to relief, because it is not disparaging. The statement that the plaintiff really disputes is CU's rating of the Bose 901 as

"between the high- and medium-accuracy groups." The allegedly harmful effect of that statement could, of course, be exacerbated by the false implication that the accuracy of the loudspeakers was determined in an objective manner. Nevertheless, the false implication that the accuracy of the tested loudspeakers was determined in an objective manner, taken alone, does not reflect adversely on the Bose 901 and is thus not disparaging.

The plaintiff also argues that because no objective score was determined for the Bose 901, it was impossible for CU to have rated the Bose 901 "with the main group of tested speakers." Thus, CU's statement that "if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-

accuracy groups" must have been false. The plaintiff's argument, however, presumes that the only way in which a loudspeaker could be rated "with the main group of tested speakers" would be if an objective score had first been determined for that loudspeaker. In reality, however, the objective scores obtained in the tests were irrelevant for purposes of the ratings because the objective scores were subsequently adjusted by Seligson to conform to his subjective assessments. Seligson's adjustments caused the entire rating process to be subjective. Therefore, no objective score was needed in order to rate the loudspeakers and CU's failure to perform objective tests on the Bose 901 would not preclude CU's rating of the Bose 901 "with the main group of tested speakers."

With regard to the "sound quality" or "accuracy" of the Bose 901, the crux of the dispute between the parties is CU's rating of the Bose 901 as "between the high- and medium-accuracy groups." The plaintiff contends that the Bose 901 should have been rated in the high accuracy group. The problem with the plaintiff's position is that all experts who testified in the case, including Dr. Bose, agreed that the evaluation of any loudspeaker's "sound quality" or "accuracy" is a subjective matter. In the final analysis it is nothing more than an opinion and, as such, it cannot be proved to be true or false. As the Supreme Court said in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may

seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

Power Requirements

CU rated the tested loudspeakers in the Article with regard to a number of characteristics, including amplifier power.[24] In its amplifier power ratings CU stated a figure in watts for each of the rated loudspeakers, ranging from a high of 27 watts for the Dynaco A25 to a low of four watts for the Yamaha NS15, explaining that:

> The power figure (in watts) is the minimum average sine-wave amplifier power found to be required to produce a loud sound in a listening room of about 3000 cu. ft. with "average" acoustics:

Seligson testified that the "loud sound" referred to in the Article was approximately 85dB[25] on average, with momentary peaks as high as 93-94dB. Tr. 11-27.

The Dynaco A25 was the only loudspeaker rated by CU in the Article as requiring more than 15 watts of amplifier power. Thirteen of the nineteen rated loudspeakers were described as requiring less than 10 watts of amplifier power. PX-7, pp. 277-278. The Article also stated that the power requirement of a loudspeaker was "an important factor" to be considered in choosing a loudspeaker. PX-7, p. 273, column 2.

With respect to the power requirements of the Bose 901, the Article stated:

> If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response.[26]

The parties seem to agree that the average reader would read the above-quoted statement in the context of the entire

Article and would therefore infer that the recommended 50 watts of amplifier power was necessary for the Bose 901 to produce the deepest bass sounds at "loud" volume levels. PRFOF p. 113, DRFOF p. 25-26 (Emphasis added). The plaintiff argues that the readers of the Article would interpret CU's statement as meaning "that the Bose 901 required more amplifier power than any of the other speakers tested by CU, and that a user would require an amplifier having a power of 50 watts per channel to produce the deepest bass sounds from the Bose 901 at loud levels, whereas the other loudspeakers tested would require only a small fraction of that power." PRFOF p. 113 (Citations omitted). According to the plaintiff, CU's statement, so interpreted, is false because the Bose 901 does not

require more power than the other rated loudspeakers to produce the deepest bass sounds at loud volume levels. The plaintiff also contends that the statement is disparaging because at the time of the Article's publication very few consumers had amplifiers of 50 watts per channel or more. Therefore, in the plaintiff's view, for the majority of consumers at that time, the Article's recommendation was tantamount to advice not to buy the Bose 901.

The Court has carefully considered all the evidence introduced by the parties on the issue of the power requirements of the Bose 901. The record with respect to this issue is replete with irreconcilably contradictory statements and evidence of questionable trustworthiness. It is difficult to understand why the record should

be so muddled with respect to an issue such as the power requirements of the Bose 901, which both parties concede can be easily measured with the use of an oscilloscope. All that was necessary was a measurement of the power required by the Bose 901 under the same conditions as those used by CU in its original tests, yet neither party performed such a measurement.[27] On the basis of the present record the matter is still entirely within the realm of speculation. Accordingly, the Court rules that the plaintiff has not sustained its burden of proving by a preponderance of the evidence that the defendant's statements -- "If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per chan-

nel for the deepest bass response." -- were false.

Size and Movement

The bulk of the testimony at trial concerned the following statements which were made in the Bose 901 Portion of the Article:

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.[28]

Before discussing the size and movement of "individual instruments" it is necessary to define some terms which will be used in the following sections of this opinion. One characteristic of stereo loudspeaker systems is that when a listener is situated in the "ideal listening position," equidistant from two loudspeakers, and the same sound emanates from the two loudspeakers simultaneously, the listener perceives the source of the sound not as either or both of the two actual loudspeakers but as a "phantom" or "apparent" source located somewhere between the two loudspeakers. There was a great deal of confusion in the terminology used at trial[29] because there are no consistent, widely accepted terms used to describe this phenomenon.[30] In this opinion the Court will use the words

"apparent sound source" to describe the area located somewhere between two loudspeakers which the listener perceives to be the source of the sound arriving at his ears. Except when quoting the Article the Court will use the word "instrument" to refer to the musical instrument that originally produced music that is later reproduced by a stereo system.

Size

The testimony at trial concerning the statement about "instruments" which "seemed to grow to gigantic proportions" was confusing at times because the parties approached the issue from different viewpoints. The plaintiff reasoned that the average reader would interpret the above-quoted statement as meaning that the "panelists" actually perceived that the physical dimensions of

the musical instruments whose sound was being reproduced had grown. Therefore, in an attempt to establish the falsity and disparaging nature of the statement, the plaintiff produced evidence that tended to show that a person listening to the Bose 901 could not possibly perceive that the physical dimensions of a musical instrument heard through the Bose 901 had grown. The defendant, on the other hand, concluded that the statement would be interpreted by the reader to mean that the apparent sound source of a particular instrument whose sound was being reproduced on the Bose 901 had become gigantic. Accordingly, in order to prove the truth of its statement, the defendant introduced evidence tending to show that it is indeed possible for a listener to perceive that the apparent sound

source of an instrument played through the Bose 901 had become quite large.

Because of the different approaches taken by the parties on this issue, the actual meaning of the words used becomes critical. Since this is a non-jury case it is the Court's obligation to determine not only whether the above-quoted statement is susceptible of the meanings suggested by the parties, but also how the statement was in fact reasonably interpreted by readers of the Article. In making these determinations the Court must construe the words used in their natural sense, as persons generally understand them. Cafferty v. Southern Tier Publishing Co., 226 N.Y. 87, 93, 123 N.E. 76, 78 (1919); Lyman v. New England Newspaper Publishing Co., 286 Mass. 258, 260, 190 N.E. 542, 543 (1934).

There is no evidence in the case that suggests that the words used would have any unusual meaning to any particular group, such as audiophiles,[31] who might have more interest in the Article than the general public.

The Court finds that the words used -- "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." -- are susceptible of both of the interpretations suggested by the parties. The words could mean that the panelists perceived that the physical dimensions of the instruments themselves had grown; they could also mean that the panelists perceived that the

apparent sound source had grown. The Court further finds, however, that the interpretation suggested by the plaintiff -- that the panelists perceived that the physical dimensions of the instruments themselves had grown -- is not a reasonable one and that the readers of the Article did not so interpret the above-quoted statement.

In making the foregoing determination the Court relies not only on its own reading of the words of the Article, but also on the testimony of Dr. Bose, which the plaintiff offered at trial to show the falsity of the statements in the Article. Dr. Bose testified at length about the phenomenon that no one, when listening to a stereo loudspeaker system, could possibly conclude that the instruments that originally generated the sound that was being

reproduced by the loudspeakers had grown to gigantic proportions. Common sense supports Dr. Bose's conclusion. To the Court's knowledge, no one has ever heard a 10-foot violin or a wall-to wall piano being played, and it would be difficult for a listener to imagine the sound produced by something totally foreign to his experience. It would be impossible to conclude that a reader would interpret the words of the Article in such an absurd manner.

The Court thus concludes that the statement in the Article about "instruments" which "seemed to grow to gigantic proportions" was interpreted by the readers of the Article to mean that the apparent sound source had become gigantic. The next question for determination is whether the statement is false even with that meaning

impressed upon it.

The defendant's witnesses testified that one peculiar characteristic of the Bose 901 is that orchestral music played through the system has a diffuse quality -- it seems to be coming from the entire wall behind the loudspeakers rather than from a discrete area along the wall or from the loudspeakers themselves.[32] According to Seligson and Lefkow, however, a different effect is produced when a recording of a solo instrument is played on the Bose 901. Seligson and Lefkow agreed that what they observed during the "special listening test" was that individual notes produced by an instrument seemed to emanate from various points along the wall of the listening room, the location of those points varying with the frequency of the note being played.

Seligson described his observations by using an analogy to the sense of sight:

> As best as I could describe it, it would be that -- if you can imagine peering at an array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's attention upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed

the fact that there is a broad light source behind.

This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you. Tr. 10-21.

With the violin wide, the impression is one predominantly of sound coming at you from roughly the entire area in front of you.

In other words, roughly from in front of the entire area. But individual notes, however, may occasionally seem to focus a little better in one location than in another and give the impression

that that is where the violin is for that moment.

And it is a shifting impression. Tr. 10-19.

Lefkow described his observations as follows:

Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is played, the violin -- the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers. Tr. 12-157.

The defendant's expert, Dr. Green, testified that:

> I have heard things (through the Bose 901) that I would describe as, first of all, as very broad image. There is no question about that. Secondly, the source is hard to localize. It's vague, and from moment to moment changes its location. So you might, especially on solo instruments, the apparent source moves from time to time. It could be located in any number of places in front of you. Tr. 14-110.

As noted above, supra at p. 20, the plaintiff concentrated its efforts on proving that a person listening to music

being played over the Bose 901 could not possibly perceive that the physical dimensions of the musical instruments which originally produced the music had grown in size. Therefore, the plaintiff did not present any evidence to contradict the defendant's evidence which tended to show that when listening to the Bose 901 a listener could and does perceive that the apparent sound source is very large. Thus, the court concludes that the plaintiff has not sustained its burden of proof by a preponderance of the evidence that the defendant's statement -- "instruments . . . seemed to grow to gigantic proportions" -- was false.

Movement

The Article states that CU's panel, Seligson and Lefkow in this instance, heard individual instruments that "tended to

wander about the room" (Emphasis added). At trial, however, both Seligson and Lefkow testified that the wandering sounds that they heard were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers were placed.[33] While conceding that the phrase "about the room" "may not be a literally accurate modifier of the verb 'wander'," the defendant argues that the consumer would only be interested in the phenomenon of wandering instruments, not in the locations to which they wandered. Thus, according to the defendant, its statement was "substantially accurate" because it accurately reported the critical observation -- instruments that tended to wander.

The Court does not accept the defendant's characterization of its statement as being "substantially accurate" because,

contrary to the defendant's assertion, the evidence indicates that the location of the alleged wandering would indeed be important to consumers. The testimony at trial showed that a certain degree of movement of the location of the apparent sound source is to be expected with all stereo loudspeaker systems. Such movement is a natural consequence of the stereo recording process and is due to the various polar radiation patterns[34] produced by an instrument at various frequencies. Because such movement between two loudspeakers is a common effect and is to be expected, a reader would not be surprised to read about "instruments" moving along the wall between two loudspeakers. Movement throughout the other areas of the room, however, is not to be expected. Such a bizarre effect is contrary

to what the average listener has become accustomed and would probably be found objectionable by most listeners. The Court concludes, then, that the location of the movement of the apparent sound source is just as critical to a reader as the fact that movement occurred, and that the defendant's statement is not substantially accurate simply because it reported accurately that "instruments . . . tended to wander . . .".

The defendant claims that its statement about wandering "instruments" must be read as modified by the following sentence, which reads: "For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." According to the defendant this sentence localized the wandering "instruments" along the wall between the

two loudspeakers. The court concludes that no reasonable reader would read these sentences as CU urges. The second sentence gives examples which could only be read by a reader as referrring to the size of the "instruments," not to their location.

The Court also finds that the average reader would interpret the word "about" in its plain ordinary meaning. Florman agreed that the word "about" in this context means the same thing as "around". Tr. 12-117, 118. In fact, Seligson's initial draft contained the words "around the room," rather than "about the room." PX-10, at p. 29.

The absence of similar observations by other listeners, both untrained and professional, tends to support the conclusion that Seligson and Lefkow did not hear "instruments" that "tended to wander about the

room." If the Bose 901 actually produced such unusual auditory effects it would be natural to assume that Bose 901 owners would complain to Bose about them. Yet Dr. Bose testified that to his knowledge no Bose 901 purchaser had ever complained to Bose about the Bose 901 causing "instruments" to appear to wander about the room. In addition, none of the reviews of the Bose 901 that were reprinted by Bose (DX-A) contain a statement that could be construed as referring to wandering "instruments." On the contrary, one of the reviews (DX-A p. 13), published in Stereo & HiFi Times, contains the following statement, which seems to directly contradict CU's comment about "instruments" that "tended to wander about the room":

A multi-directional speaker seems to

> have its sound escape from its box. The source of the sound becomes an area of space above and behind the actual enclosure. This is created beautifully by these speakers. A stereo pair fills the wall with stereo, yet each instrument has its prescribed space - and it stays there. You can spread these speakers much wider apart than conventional boxes without creating a "hole-in-the-middle" effect. DX-A, p. 13 (Emphasis added).

Based on the foregoing analysis, the Court finds that the statement in the May 1970 Article that "individual instruments heard through the Bose system . . . tended to wander about the room" is false. The Court also finds that the statement is disparaging. A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product.[35] That such a harmful effect was intended is

demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an even greater deficiency in the product.

Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wandering instruments and the statement about gigantic power required." Tr. 2-144. Thus, the false statement that "individual instruments heard through the Bose system . . . tended to wander about the room" cannot be considered a de minimis violation of

the plaintiff's rights.

In summary, The Court has ruled that with respect to one statement made in the Article -- "individual instruments heard through the Bose system . . . tended to wander about the room" -- the plaintiff has sustained its burden of proving by a preponderance of the evidence that the statement was both false and disparaging. With respect to each of the other statements contained in the Article the Court has ruled that the plaintiff has failed to sustain that burden in some respect.

Because the Court has ruled that at least one statement contained in the Article was both false and disparaging, the remaining question for determination is whether the defendant observed the required standard of care in making that statement. Before

making that determination, however, the Court must first assess the impact of the Supreme Court's First Amendment decisions on the standard of care required of the defendant.

First Amendment Issues

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court first announced the federal rule under the First Amendment "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. Under the New York Times rule, actual malice must be shown with "convincing clarity" rather than by a mere

preponderance of the evidence.[36] Id. at 285-86.

The Court extended the scope of the New York Times privilege in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), by holding that the constitutional privilege applies to defamatory statements about public figures as well as about public officials. The New York Times privilege was then given its most expansive reading in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), where a three-member plurality of the court held that the privilege could also be asserted against a private individual involved "in an event of public or general concern." Id. at 52. Under Rosenbloom the focus was no longer on the status of the plaintiff, but on the newsworthiness of the events involved.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court rejected the Rosenbloom "public interest" test and reverted to a status based test. The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual," Id. at 347 (Citation omitted). Thus, under Gertz, a plaintiff who is neither a public official nor a public figure is no longer required to prove that a defamatory statement was made with "actual malice."

Predictably, the defendant asserts the New York Times constitutional privilege as a defense to this action. The facts of the present case, however, raise some issues

under the New York Times standard which are at present unsettled. For example, the two following questions must be confronted.

1) Does the New York Times actual malice standard apply to product disparagement cases as well as to personal defamation actions?

2) Can a corporation become a public figure and, if so, how?

The Court's resolution of the foregoing questions will determine whether the actual malice standard applies in this case. The Court must then determine whether the plaintiff has sustained its burden of proof under the applicable standard.

Does the actual malice standard apply to product disparagement cases?

All the Supreme Court cases to date which have applied the New York Times

standard have been personal defamation actions rather than product disparagement cases or cases involving defamation of a corporation. Lower court decisions, however, seem to suggest that the actual malice standard should not be limited to personal defamation actions.

A case in point is Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, (3d Cir. 1980). In Steaks Unlimited a television station broadcast a report by its consumer affairs editor which deprecated the quality of the meat being sold by an out-of-state corporation at several local department stores. Because the report was also critical of the corporation's business practices, the corporation brought suit for defamation rather than product disparagement. The court held that, because the

corporation was a public figure under Gertz, the actual malice standard was applicable.

In F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F. Supp. 292 (N.D. Ohio 1974), the court reached a similar result, although it should be noted that the court was applying the Rosenbloom "public interest" standard. In F & J Enterprises the plaintiff claimed that the defendants broadcast and published disparaging statements about the plaintiff's product, "Krazy Straw." Once again, as in Steaks Unlimited, supra, the case seems to have been treated as a corporate defamation case rather than a product disparagement action. The Court, after determining that the statement concerned a matter of public interest, held that the actual malice standard applied.

Neither Steaks Unlimited nor F & J Enterprises specifically addressed whether the actual malice standard applies in cases of product disparagement because both cases were treated as corporate defamation actions. Nevertheless, by applying the actual malice standard in cases involving corporate defamation, Steaks Unlimited and F & J Enterprises suggest that the actual malice standard is not limited to personal defamation actions.

An analysis of the Supreme Court's reasoning in New York Times also leads to the conclusion that the actual malice standard should not be limited to personal defamation actions. In the New York Times line of cases the Supreme Court has attempted to strike a balance between the need for a vigorous and uninhibited press and the

legitimate state interest in compensating individuals for wrongful injury to reputation.

The nature of the balancing process changes significantly in product disparagement cases because different interests are being weighed. In a personal defamation action one of the competing interests being balanced is an individual's interest in the protection of his reputation, which, according to Mr. Justice Stewart "reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion). On the other hand, in this product disparagement action we are concerned with a manufacturer's interest in the reputation

of its product, an interest not nearly as significant as an individual's interest in his personal reputation and hardly "at the root of any decent system of ordered liberty." Damage to a product's reputation, unlike damage to the reputation of an individual, can always be measured in terms of monetary loss. Moreover, a manufacturer almost always has access to the channels of communication that can be used to refute disparaging comments about its product.

On the other side of the scale in this balancing process is the consumer's interest in obtaining information about the quality and characteristics of consumer products. The public's interest in obtaining information of this type is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtain-

ing information about other people. Information obtained from product commentators often relates to health or safety problems in consumer products. See e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F. Supp. 292 (N.D. Ohio 1974). It would be unfortunate indeed if the threat of product disparagement actions stifled the free flow of such information.

On balance, the Court concludes that the factors underlying the New York Times privilege militate perhaps even more strongly in favor of the application of the actual malice standard in product disparagement cases than they do in personal defamation

actions. Accordingly, the Court rules that the New York Times actual malice standard is applicable in this product disparagement case, provided, of course, that the plaintiff is a public figure for first Amendment purposes.

Can a corporation become a public figure and, if so, how?

Under Gertz only a plaintiff who is a public official or public figure is required to prove that disparaging statements were made with actual malice. The difficulty in this case is that the plaintiff is a corporation and because the Supreme Court cases in this area have dealt only with personal defamation, no standards have been developed by the Supreme Court for use in determining whether a corporation is a public figure. In the personal defamation area Gertz iden-

tified several categories of public figures:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. 418 U.S. at 345.

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy, and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. 418 U.S. at 351.

This case involves the category specified in Gertz which is composed of plaintiffs who "have thrust themselves to the forefront of particular public controversies," 418 U.S. at 345, and have thereby become public figures for a limited range of issues.

Various courts have struggled with the application of Gertz and other relevant Supreme Court cases in determining whether a corporation is a public figure for First Amendment purposes, but their conclusions have not been uniform.[37] Of the cases that have considered the issue thus far, Bruno & Stillman, Inc. v. Globe Newspaper Co., Nos. 80-1172 and 80-1173 (1st Cir. October 17, 1980), sets out perhaps the most reasoned and coherent analysis of the corporate public figure issue.

In Bruno & Stillman the plaintiff corporation, a manufacturer of commercial fishing boats, brought suit against the defendant newspaper company, alleging that the defendant published a series of libelous newspaper articles about the plaintiff. The defendant moved to dismiss, contending that the plaintiff, as a public figure, was required to comply with the stringent requirements of New York Times. The district court ruled that "corporations should be treated as public figures" and accordingly granted the defendant's motion to dismiss the Count of the Complaint which was based on mere negligence. Bruno & Stillman, supra, slip op. at 4. The plaintiff's appeal followed. The first step in the Court of Appeals' analysis was to identify which of the class-

es of public figures that were delineated in Gertz was relevant for the purposes of the case before it. In Bruno & Stillman, as in this case, the relevant class was constituted of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," Gertz, supra, 418 U.S. at 345, and therefore are public figures for a limited range of issues.

The Court of Appeals next reviewed the applicable Supreme Court cases and concluded that "the detailed, fact-sensitive nature of the precedent indicates that particularized determinations of public figure status are the rule." Bruno & Stillman, supra, slip op. at 11. Therefore, the court re-

jected the district court's conclusion that all corporations are public figures, stating that "We recognize the attraction of broad and clearcut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for first Amendment purposes." Id. at 11.

The court then proceeded to utilize the following two-step analysis in its particularized examination of the facts of the case. First, the court determined whether a public controversy existed, and, if so, whether it preceded the alleged defamation. The facts in Bruno & Stillman disclosed no public controversy antedating the allegedly defamatory articles. Second, the court followed the recommendation in Gertz that "It is preferable to reduce the public-

figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Gertz, supra, 418 U.S. at 352. The court therefore examined the facts of the case relating to the "nature and extent" of the plaintiff's activity in the controversy in question. On the basis of the record before it the court concluded that there was insufficient evidence that the plaintiff had thrust itself into the vortex of a public controversy and thus rendered itself a public figure. Consequently, the court held that the motion to dismiss was improperly granted and remanded the case for further development of the record with respect to the public figure issue.

The Court has already determined, supra, p. 32, that the present action is a "thrusting into the vortex" case, Bruno & Stillman, supra, slip op. at 16, and thus merits the particularized approach outlined in Bruno & Stillman. The first question for determination, then, under Bruno & Stillman, is whether a public controversy preceded the publication of the allegedly disparaging comments about the Bose 901. The Court finds the relevant facts to be as follows.

The design of the Bose 901 was a radical departure from the design of conventional loudspeakers. With its emergence on the market in 1968 the Bose 901 introduced several new and unique design concepts, including the use of an active equalizer, the use of both direct and reflected sound, and the use of nine identical drivers. A great

deal of publicity attended the introduction of the Bose 901. As part of its promotional efforts, Bose published advertisements that stressed the principles of operation of the Bose 901, its unconventionality, the research underlying it, its unique appearance, and its quality. Bose not only advertised extensively in national publications to promote the Bose 901, but also actively solicited reviews of the Bose 901 by responsible reviewers so that its unique qualities would be brought to the attention of consumers. By May 1970 Bose had succeeded in having reviews of the Bose 901 published in several magazines and had spent over $100,000 in 1969 alone to advertise the Bose 901.[38]

By creating a new design for the Bose 901 and then emphasizing that unique design

in its extensive promotional campaign, the plaintiff precipitated discussion about the relative merits of the Bose 901 and other loudspeaker systems. Because other loudspeaker manufacturers and reviewers for nationally published magazines were involved, the "controversy" was necessarily public rather than private. Thus, this case presents a situation where "persons actually were discussing some specific question" -- the relative merits of the Bose 901 and conventional loudspeaker systems -- and "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297, cert. denied, ___U.S.___, 49 U.S.L.W. 3270 (Oct. 14, 1980)(No. 79-2064)

(footnote omitted). It is not a case where the defendant attempted to "create (its) own defense by making the claimant a public figure." Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979). The defendant, by its publication of the Article, did not create the public controversy. It simply added its voice to the chorus that was already discussing the merits of various loudspeaker systems. Thus, in the present case there was a "public controversy" that preceded the publication of the allegedly disparaging remarks.

The second part of the Bruno & Stillman analysis is to determine "the nature and extent of (the plaintiff's) participation in the particular controversy giving rise to the defamation." Gertz, supra, 418

U.S. at 352. In this case the plaintiff's participation in the "controversy" over the relative merits of the Bose 901 and conventional loudspeakers was extensive. The plaintiff actually precipitated the controversy by using a market strategy that emphasized the unconventional design of the Bose 901. Unlike the record in Bruno & Stillman, which was silent with regard to the scale and nature of the plaintiff's promotional efforts, the record in this case fully discloses the types of promotional efforts used by the plaintiff and the degree to which they were employed. The extent of the plaintiff's advertising alone might very well justify a holding that the plaintiff is a public figure. Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 274 (3d Cir. 1980) (advertising blitz).

In addition to its extensive advertising of the Bose 901, however, the plaintiff also actively sought to have reviewers test and review the Bose 901, and then incorporated such written reviews in its advertising brochures. These actions by the plaintiff clearly "invited public attention, comment, and criticism." Steaks Unlimited, supra, 623 F.2d at 274.

Gertz suggests that at least two factors in addition to those discussed in Bruno & Stillman are to be considered in determining whether a plaintiff is a public figure. First, the Court noted in Gertz that public officials and public figures usually enjoy greater access to the media than private individuals and can thereby counteract the effects of false statements.[39] Second, the Court pointed out that public officials

and public figures have voluntarily assumed the increased risk of defamatory falsehood that accompanies their notoriety, at least to the extent that their own conduct has precipitated that notoriety.[40]

Both factors militate in favor of holding Bose to be a public figure in this case. Bose unquestionably had access to the media to rebut the false statements published in the Consumer Reports Article. In fact, in February 1971, a few days prior to the filing of the complaint in this case, Dr. Bose and Frank Ferguson,[41] the president of Bose Corporation at that time, personally delivered copies of the unfiled complaint to the United Press International, the New York Times, Business Week, and the Boston Herald Traveler. Each of those organizations subsequently published an article detailing

Bose's charges against CU. In addition, Bose continued to have access to the media to extensively advertise its product.

It is also clear that Bose voluntarily assumed the increased risk of injury from defamatory falsehood. Bose not only extensively advertised the Bose 901, but also actively sought to have its product reviewed by product commentators. Bose then used reprints of the published reviews as part of its advertising campaign. By soliciting such reviews Bose voluntarily assumed the increased risk of injury from defamatory falsehood which naturally followed.

Based on the foregoing analysis under Gertz and Bruno & Stillman, the Court rules that Bose is a public figure, at least with respect to the limited issues of the charac-

teristics and quality of the Bose 901. Consequently, the plaintiff is required to show, by clear and convincing proof, that the false statements published by the defendant were published with the knowledge that they were false or with reckless disregard of their truth or falsity.

Motivation

A significant portion of the testimony at trial concerned Seligson's motivation to disparage the Bose 901. Motivation, of course, is not an element of the tort of product disparagement. In this case, however, the defendant suggests that the absence of any possible motive to disparage militates strongly against a finding of actual malice. Most of the testimony focused on the effect of Seligson's patent on his own evaluation of the Bose 901.

According to the plaintiff, if the Seligson patent had ever been commercialized[42] it would have competed directly with the Bose 901 in the marketplace. The plaintiff claims that the desire to head off such prospective competition provided the motivation for Seligson to downgrade the Bose 901.

The defendant disputes the plaintiff's suggestion that Seligson's patent provided a motive for downgrading the plaintiff's product and offers the following three arguments to support its position. First, Lefkow, as well as Seligson, approved the Article and Lefkow had no reason to downgrade the Bose 901. The plaintiff responds that Lefkow, as Seligson's friend and subordinate, had reason to acquiesce in Seligson's decision to disparage the Bose

901. Second, Seligson had no reason to single out the Bose 901 for criticism, rather than any other loudspeaker system, if his intent was simply to smooth the way for his own product. The plaintiff counters this argument by suggesting that Seligson recognized that the Bose 901 was the best loudspeaker system on the market and therefore naturally aimed his attack at the Bose 901. Third, according to the defendant, by the time of the loudspeaker tests in November 1969, Seligson had lost all interest in developing a commercial product from his invention. The plaintiff relies on Seligson's execution of the Menden Agreement to refute the suggestion that Seligson had lost all interest in commercializing his patent. In the plaintiff's view, if Seligson had really lost all interest in commercializing his

patent, he would never have spent so many hours working to produce the model called for by the Menden Agreement.

Having reviewed the record and considered the demeanor of the witnesses involved, especially that of Seligson, the Court finds that the possible commercialization of his own patent did not influence. Seligson's evaluation of loudspeakers for the Article. Specifically, the Court finds that Seligson did not downgrade the Bose 901 in order to smooth the way for his own invention.

It does not necessarily follow from this finding, however, as the defendant suggests, that Seligson therefore had no reason at all to downgrade the Bose 901. The record discloses at least two other influences that could have caused Seligson to make deprecatory comments about the Bose 901. First,

the plaintiff suggested, but presented scant proof, that the defendant's magazine has a built-in bias against higher-priced products because it claims to save money for consumers. According to the plaintiff, such a bias would lead the defendant to disparage higher-priced products such as the Bose 901. Second, according to Dr. Bose, the defendant's executive officer, Walker Sandbach, stated that CU resorts to the use of "sarcasm" and "spice" in order to boost circulation. Dr. Bose testified, without contradiction, that the defendant's officers told him that a survey supported their belief that consumers read Consumer Reports for entertainment rather than for product information. Dr. Colston Warne, the chairman of CU's board of directors, told Dr. Bose that the readers of Consumer Reports "love to

read about vermin hair in Campbell soup."[43] The desire to inject a little "sarcasm" and "spice" is another possible motivation for Seligson's attribution of grotesque qualities to the Bose 901.

Thus, although the Court has found that Seligson's patent did not motivate him to downgrade the Bose 901, the Court cannot justifiably say that there was no possible reason for Seligson to disparage the Bose 901. Consequently, the Court will not indulge the inference, suggested by the defendant, that because there was not motivation to disparage, there could be no actual malice.

Actual Malice

In any case in which the actual malice standard is applicable the plaintiff bears the heavy burden of proving that the defen-

dant published false statements with a "high degree of awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1967). Despite its formidable burden, the plaintiff in this case has consistently maintained throughout the pendency of this action that it would be able to show, with clear and convincing proof, that the statements in the Bose 901 Portion of the Article were published by CU with the knowledge that they were false or with reckless disregard of their truth or falsfty.

The plaintiff contends that, because the statement about wandering instruments which

appeared in the Article conflicted directly with the testimony of Seligson and Lefkow concerning their observations, both Selgison and Lefkow must have known that the statement in the Article was false. The plaintiff does not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that Seligson and Lefkow, who made the actual observations, must have known that the statement was false.

To rebut the inference of actual malice which the plaintiff seeks to establish, the defendant places great emphasis on the testimony of Seligson and Lefkow, who consistently professed their good faith belief in the accuracy of the Article as written. Because Seligson wrote the words upon which

the false statement in the Article was based, it is his state of mind that is critical.[44] On cross examination Seligson testified as follows concerning the "instruments" that "tended to wander about the room."

> Q. Mr. Seligson, why did you use the words "tended to wander about the room" to decribe what you have drawn on the board?
>
> A. Well, I don't know what made me pick that particular choice of words. Would you have been more satisifed if we said "across" -- I think not -- instead of about. I have the feeling you would have objected in either event. The word "about" meant just as I drew it on the board. Now, I so testified in my deposition -- Tr. 9-153.

Thus, according to Seligson, the words used in the Article--"About the room" -- mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication

of the Article he interpreted, and he still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain ordinary meaning.

Based on the above finding that Seligson's testimony to the contrary is not credible, the Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments . . . tended to wander about the

room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.

Lanham Act and Unfair Competition

Count I of the complaint in this action alleges unfair competition. Count II of the complaint charges that the defendant violated Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a)(1976), by misrepresenting the nacure of its own goods -- Consumer Reports magazine. The alleged mis-

representation that provides the basis for the claims made in both Counts I and II is CU's statement, contained in each issue of Consumer Reports, including the May 1970 issue, that "CU pledges that any opinions entering into its Ratings of products shall be as free of bias as it is possible to make them."[45]

According to the plaintiff, Seligson's patent on a prospectively competing loudspeaker system introduced bias into CU's ratings of loudspeakers, thus causing CU's statement to be false. The Court has already found, supra. p. 39, that Seligson's patent did not influence his rating of the tested loudspeakers and specifically did not influence his rating of the Bose 901. Although the plaintiff also suggested that Consumer Reports has a built-in bias against

higher-priced products, it offered insufficient evidence on this issue to warrant a finding that CU was biased.

After a careful review of the testimony at trial, the Court concludes that the plaintiff has not satisfied its burden of proving by a preponderance of the evidence that bias in fact entered into CU's ratings of loudspeakers. The matter is still entirely within the realm of speculation. Accordingly, judgment will be entered for the defendant with respect to Counts I and II of the complaint.

Conclusion

The Court has ruled that the plaintiff has not sustained its burden of proof on Counts I and II of the complaint. Judgment will therefore be entered for the defendant with respect to those Counts. The Court

has also ruled that the plaintiff has sustained its burden of proving, with clear and convincing proof, that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. Therefore, with regard to Count III of the complaint, which alleges a claim of product disparagement, judgment will not be entered for either party until a separate trial is held on the issue of damages.

U. S. Senior District Judge

Footnotes

1. Without seeking to apportion responsibility for the profusion of filings in this case, the Court simply notes that the files generated in this case by only two parties are now well over one foot in depth.

During the course of the trial the Court deferred its rulings on two evidentiary questions:

1) The admissibility of DX-AB (warranty registration cards); and
2) The admissibility of testimony by Dr. Bose concerning a letter dated December 12, 1964, which was written by Arnold L. Seligson to a patent attorney. Tr. 3-67 through Tr. 3-75.

After further consideration of the arguments and the memoranda of counsel, the Court overrules the plaintiff's objection to DX-AB and rules that DX-AB be admitted into evidence. The Court also overrules the defendant's objection to the admission of Dr. Bose's testimony concerning the Seligson letter because the objection bears only on the weight to be given to that testimony, not on its admissibility.

References in this Opinion to documents filed in this case will be made in the following manner.

Plaintiff's and Defendant's Exhibits will be referred to by the notation "PX" or "DX" followed by the exhibit number. Transcript pages will be referred to by the notation "Tr" followed by the appropriate page number. The "Stipulation of Undisputed Facts," filed by the parties at the beginning of the trial, will be referred to as "Stip. A." In that stipulation the parties stipulated that there was no dispute as to certain facts set forth in "Plaintiff's Requested Findings of Fact (Before Trial)" and in "Defendant's Statement of Uncontested Facts." Therefore all references to Stip. A will be followed by the notation PRFOF or DSOUF, followed by the appropriate paragraph number.

3. A driver is the element within a loudspeaker that physically displaces air in order to produce sound. Stip. A, PRFOF 22.

4. Bose advertised in High Fidelity, Stereo Review, Audio, Hi-Fi Buying Guide, and American Record Guide, in addition to other high fidelity magazines. Stip. A, DSOUF 16.

5. Bose advertised in Saturday Review, Rolling Stone, Playboy, and other publications with nationwide distribution. Stip. A, DSOUF 16.

6. Bose estimates that it distributed to the general public at least 1,000,000 copies of each of at least seven reviews

that it reprinted. Stip. A, DSOUF 26.

7. Each December issue of Consumer Reports is in the form of a paperback book of approximately 400 to 450 pages, called the "Buying Guide Issue" of Consumer Reports. The "Buying Guide Issue" contains information reprinted from prior issues of Consumer Reports which have been published over a period of several years. Stip. A, PRFOF 5.

8. Dr. Green defined psychoacoustics as being the study of "acoustics as it relates to reactions of people hearing sound." Acoustics is the study of the physical properties of sound and does not generally involve the human observer. Psychoacoustics deals with "what people hear and the mechanism by which they hear it." Psychoacoustics, a branch of psychophysics, is a discipline that lies on the border of physics and psychology. Tr. 14-5.

9. The following objective tests were performed:

   1) Measurements such as height, depth, length, color, etc. were made by simple observation of the loudspeaker cabinet itself.
   2) Electrical characteristics, such as admittance, were measured both before and after a break-in period.
   3) The electrical impedance was measured.
   4) Frequency response was measured in an anechoic chamber and in CU's

listening room.

5) The low frequency response was measured in an anechoic chamber.

6) Total harmonic distortion was measured.

7) The polar response of the loudspeakers was measured.

Tr. 7-3, 4.

A portion of the evidence produced at trial concerned the disconnection of one of the drivers in one of CU's Bose 901 loudspeakers. The plaintiff argues that the defendant tampered with the loudspeaker in order to alter subsequent test results. The Court shares the plaintiff's concern that the evidence in this case may have been tampered with at some time. Nevertheless, the Court is satisfied that CU's Bose 901 loudspeakers were in proper working condition at the critical time -- when they were tested in 1969 and 1970. The impedance measurements taken in 1969 confirm that all the drivers were functioning at that time. If someone did tamper with the loudspeaker at a subsequent time it would, of course, be reprehensible, but it would not affect the Court's analysis of the evidence.

10. Seligson felt that the A-B listening test worked to the disadvantage of the Bose 901 because that test only asked the listening panel to judge whether the tested loudspeaker sounded similar to the reference loudspeaker, which was a conventional, forward-radiating loudspeaker. Seligson thought

that because "the Bose 901 had a type of aural space that was different from the forward-radiating loudspeakers . . . such a difference would crop up unfavorably to the disadvantage of the Bose." Tr. 11-71.

11. The Bose 901 and the Harman-Kardon HK-50 loudspeakers were chosen for the "special listening test" because of the special sound characteristics that were claimed in their behalf by their manufacturers. No other tested loudspeakers were subjected to the "special listening test." Tr. 13-126, 127, PX-9. The "special listening test" conducted on the HK-50 loudspeakers was discontinued very quickly because no unusual auditory effects were noted when listening to them. Tr. 7-101, 102.

12. CU contends that the cricket test was conducted on January 20, 1970. The plaintiff, on the other hand, contends that the cricket test never took place and that the results of the test were entirely fabricated by Seligson and Lefkow. To support this contention the plaintiff relies on a weekly progress report (PX-23) for the loudspeaker testing project, dated January 14, 1970, which states, "All tests finished" on the same line as the figures "2/1". The plaintiff argues that this statement indicates that all tests on the loudspeaker testing project were completed by January 14, 1970, six days before the cricket test supposedly took place. Therefore, according to the plaintiff,

the cricket test, if it took place at all, was conducted after the testing project had already been concluded, and the results of such a test could not have formed a basis for the text of the Article. CU contends that the figures "2/1" indicate that the author of the report projected that all tests would be finished by February 1, 1970.

The plaintiff also relies on the fact that the cover of the project data book (PX-9) containing the results of the cricket test bears the notation 12/20/70 on a line following the words "Date Started." Since the Article was published in May 1970, any data generated in December 1970 or thereafter could not have formed the basis of statements contained in the Article. CU contends that Lefkow incorrectly transposed the date 1/20/70, and wrote 12/20/70 on the cover of the project data book instead. The plaintiff further relies on the failure of the defendant to produce the "cricket tape" which the defendant allegedly used in the cricket test.

After carefully considering the foregoing evidence, the Court finds that the cricket test did indeed take place. The Court does not consider the inconsistencies pointed out by the plaintiff to be particularly significant, especially in view of the witnesses' detailed description of both the tape and the test and the conformity of that description with the description contained in the Article.

13. Seligson described his idea as follows:
These experiments are directed to the development of a loudspeaker which produces sound by (1) ionizing air molecules (2) accelerating them in one direction by a high d-c potential, which accelerates the air, by collision effects, in the same direction; (3) modulating the air flow by modulating the potential applied, to produce sound. PX-12, p. 1.

14. Letter from A. L. Seligson to Robert W. Fiddler, stapled to p. 26 of PX-12.

15. Compare the final version of the Bose 901 Portion of the Article as it appears on p. 4, supra, with Seligson's draft of the Bose 901 Portion as contained in the Report to Editorial:

> The Harman-Kardon HK-50 omnidirectional speakers, the Bose system and a pair of check-rated loudspeakers (ADC 303ax) were compared in an instantaneous A,B,C listening experiment to ascertain what effect the purported special sound radiation characteristics of the HK-50 and Bose systems have upon stereo reproduction. First, a special test tape was prepared in CU's anechoic chamber. This was a stereo recording of a small sharp-sounding noisemaker ("cricket") as it moved in seven equal distinct steps from extreme left to extreme right. Listeners in

CU's sound room were asked to judge the direction from which the sound appeared to come by listening to each of the three stereo systems when seated directly between the two loudspeakers -- the ideal listening location -- and when seated to the extreme side of the room. In all three cases, the listeners were able to accurately localize the sound when seated in the ideal listening position but were unable to accurately locate the sound when seated in the extreme listening position. From this experiment CU derives the conclusion that with respect to accurate stereo sound localization of distinct sharp noises, or clicks, at least, there is no significant difference between the conventional, omnidirectional or Bose concept of loudspeaker design.

"A second experiment was conducted. We repeated the A,B,C listening experiment this time using as program material, a wide variety of stereo records. Repeated observations from every position in the listening room discerned little or no difference between the Harman-Kardon and the conventional loudspeakers either with respect to accurate localization of instruments or with respect to overall impressions of the recording "space". Now, however, the Bose was outstand-

ingly different from the other two systems. Sound from the Bose seemed considerably more spacious and reverberant with a greater feeling of ambiance, giving an effect equivalent to having the wall next to the speakers in the listening room drop away revealing a vastly more open acoustically live space beyond. After listening to a number of recordings this way, it became apparent that precise localization of musical instruments (as opposed to the sharp noised cricket of experiment 1 (the cricket test)) appeared to be inferior to that of the standard loudspeaker system even when the listener was seated in the ideal listening position for good stereo, but that the overall heightening of the acoustic ambiance held up well in just about any listening position. Continued listening revealed a number of other disturbing aspects to the Bose system. Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room; a violin seemed about 10 ft. wide, a piano stretched from wall to wall, etc. These effects were entirely innocuous when listening to orchestral music but we can see how they might become quite disturbing when listening to soloists. Then the idea occurred to us to see what might happen when the Bose

loudspeaker system reproduced monophonic records and lo and behold, the system imparted the same kind of vast spaciality to them as it did to stereo records producing the same kinds of physical size distortions noticed in the case of stereo records. Nevertheless, many listeners will find the overall effect produced by the Bose exciting, we think they may be willing to overlook the system's deficiencies to attain these effects. Audio purists, beware.

"Insofar as the sound quality of each unit (sic), the Harman-Kardon would have been placed in the lower group of medium accuracy loudspeakers. Its sound was distinctly hollow and muddy. The Bose produced relatively good sound quality and would rank somewhere between the high and medium accuracy group about on a par with the AR 3A. Its main fault was in the bass. The small individual loudspeakers that the Bose system uses are not by themselves capable of radiating extreme low frequencies, hence a need for the equalizer box, the electronic gadget that one plugs into the amplifier or receiver. Among other functions, this electronically provides the bass to compensate for the small loudspeaker weaknesses and in fact, it succeeds in doing a pretty remarkable job enabling

the Bose to reproduce extremely deep bass sound. But the combination of equalizer and loudspeaker tends to overemphasize the middle bass giving it a somewhat overly-full heavy sound in this register.

(Material pertaining to Harman-Kardon HK-50 loudspeakers omitted)

Essential Facts

"The Bose loudspeakers are irregularly shaped boxes having the overall dimension of 13 x 20 3/4 x 13 in. and each weighing 34 lbs. The impedance of each loudspeaker was 9 1/2 ohms (minimum and nominal) and they required at the very least an amplifier power of 30 watts (for deepest bass 50 watts would be still better)." PX-10, p. 27-33.

16. Many other terms have also been used in referring to the tort of product disparagement. Among them are trade libel, slander of title, slander of goods, disparagement of title, disparagement of goods, unfair competition, interference with prospective advantage, and injurious falsehood. W. Prosser, Injurious Falsehood: The Basis of Liability, 59 Colum. L. Rev. 425 (1959).

17. The parties have agreed that the laws of the states of Massachusetts and New York are identical with respect to the elements of the tort of product

disparagement, thus eliminating choice of law as an issue in this case.

18. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1973), the Supreme Court held in a personal defamation action that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

19. The plaintiff concedes that the following statements contained in the Article might be construed as complimentary to the Bose 901:

> When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

20. The complimentary effect created by the language quoted in note 19, supra, is clearly undercut by the following paragraph which is introduced by the word "But," and contains language that can hardly be considered complimentary:

> But after listening to a

number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists. On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same spacial openness and size distortions as the stereo records.

21. Plaintiff's Requested Findings of Fact and Conclusions of Law, p. 197.

22. The terms "roughness index," "spectrum index," and "low frequency index" are not generally accepted terms within the field of loudspeaker testing. Rather, they are terms that were invented by Seligson and Lefkow in an ad hoc fashion to refer to the testing procedure they followed. Tr. 9-103.

23. At least for the purposes of this trial, a conventional loudspeaker was defined as a loudspeaker whose drivers are mounted on the front panel and

radiate sound in a forward direction directly out into the listening room. Tr. 9-110.

24. Although the Bose 901 was tested in almost the same manner as the other tested loudspeakers, it was not rated along with the other loudspeakers because it was not in the medium price range. PX-2, p. 272, 277-78; Tr. 6-159, 160.

25. The loudness of sound is usually measured in units known as "decibels," which correspond to varying sound pressure levels on a logarithmic scale. The number of decibels increases as loudness increases. The scientific notation for decibels is "dB." Tr. 2-43; PX-1, p. 109.

26. The above quoted words contained in the Article were based on the following words contained in Seligson's draft Report to Editorial (PX-10, p.33): "The impedance of each loudspeaker was 9 1/2 ohms (minimum and nominal) and they required at the very least an amplifier power of 30 watts (for deepest bass 50 watts would be still better)."

27. CU attempted such a measurement but failed to use the same type of recordings that it used in its original tests of the Bose 901.

28. The above quoted language was based on the following statements in

Seligson's draft Report to Editorial (PX-10):

"After listening to a number of recordings this way, it became apparent that precise localization of musical instruments (as opposed to the sharp noised cricket of experiment 1 (the cricket test) appeared to be inferior to that of the standard loudspeaker system even when the listener was seated in the ideal listening position for good stereo, but that the overall heightening of the acoustic ambiance held up well in just about any listening position. Continued listening revealed a number of other disturbing aspects to the Bose system. Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room; a violin seemed about 10 ft. wide, a piano stretched from wall to wall, etc. These effects were entirely innocuous when listening to orchestral music but we can see how they might become quite disturbing when listening to soloists. Then the idea occurred to us to see what might happen when the Bose loudspeaker system reproduced monophonic records and lo and behold, the system imparted the same kind of vast spaciality to them as it did to stereo records producing the same kinds of physical size distortions noticed in the case of stereo

records."

29. The following terms all seem to have been used by various persons at various times during the trial to refer to the same phenomenon: apparent source, sonic image, effective source, sound image, phantom source, acoustic image, auditory image, auditory source, image, source, apparent sound image, and apparent sound source. The confusion wss compounded when the questioners and witnesses spoke about the size or location of the "apparent sound source." For example, references to size included the following terms: size of the sound, spacial dimension of the sound, apparent size of the source, and size of the image.

30. Tr. 18-121.

31. Dr. Bose testified that an "audiophile" is a person "who specializes in audio equipment in his home." Tr. 4-28.

32. Tr. 7-103, 12-155, 14-110.

33. In order to rebut the charge made by Dr. Bose that it is scientifically impossible for anyone to perceive instruments that "tended to wander about the room," the defendant presented the testimony of its expert, Dr. Green, who testified at length concerning a person's ability to perceive that the apparent sound source of a particular sound had moved away from the wall out into a room. However, because both mem-

bers of CU's panel, Seligson and Lefkow, testified that the wandering sounds were confined along the wall, Dr. Green's testimony concerning a person's ability to perceive that an apparent sound source had moved out into the room is, strictly speaking, irrelevant.

The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded.

34. A musical instrument radiates a single frequency at different intensities depending upon the direction. A graphical representation of the intensity versus direction yields what is known as a polar radiation pattern for that single frequency. Tr. 2-65,66, 19-83,84.

35. The defendant claims that the following limitation contained in the Article somehow mollifies the harmful effect of its false statement:

> With orchestral music, such effects seemed inconsequential.

> But we think they might become annoying when listening to soloists.

The defendant, however, offered no evidence to prove that a significant number of persons limit their musical tastes to orchestral music. Even in orchestral music there are often solo passages. Therefore, the Court does not agree that the above-quoted statement in any way cushions the blow of the earlier statement that instruments "tended to wander about the room." In fact, the subsequent statement enhances the disparaging effect of the earlier one because it characterizes the effects heard as possibly becoming "annoying."

36. The Court subsequently made clear that "convincing clarity" is identical with "clear and convincing proof." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1973). Under New York Times only actual malice must be demonstrated with clear and convincing proof. The plaintiff must satisfy the traditional preponderance of the evidence standard with respect to the other issues in the case.

37. Bruno & Stillman, Inc. v. Globe Newspaper Co., Nos. 80-1172 and 80-1173 (1st Cir. October 17, 1980) (Plaintiff corporation not a public figure under Gertz based on record presented to court); Vegod Corp. v. American Broadcasting Companies, Inc., 25 Cal. 3d

763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979) (Plaintiff corporation not a public figure under Gertz -- "Criticism of commercial conduct does not deserve the special protection of the actual malice test." 25 Cal. 3d at 770, 603 P.2d at 18, 160 Cal. Rptr. at 101); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (d.d.c. 1976) (All corporations are public figures under Gertz, but are required, under Rosenbloom, to prove actual malice only if publication concerned matter of public interest); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) (Plaintiff corporation was public figure under Gertz for limited range of issues); Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) (Plaintiff corporation was public figure under Gertz for limited range of issues).

38. Bose spent approximately $100,000 to advertise and promote the Bose 901 during the fiscal year ending June 30, 1969. During the next year, ending June 30, 1970, Bose spent at least $200,000 on advertising and promotion. In the fiscal year ending June 30, 1971, Bose spent at least $300,000 on advertising and promotion. Stip. A, DSOUF 27.

39. "The first remedy of any victim of defamation is self-help -- using available opportuities to contradict the lie or correct the error and thereby to minimize its adverse impact on repu-

tation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statement than private individuals normally enjoy." "Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1973) (footnote omitted). Whether this factor is to be accorded substantial weight is open to question in view of the following statement in Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977), which was quoted with apparent approval by the court in Bruno & Stillman, supra, slip op. at 12, n. 5.

> "The 'access to media' argument is no more than a makeweight. There are many public figures who are so scorned and reviled by the media as to have little or no access for purposes of counteracting a libel. These remain yet public figures." Reliance Insurance, supra, at 1348.

40. "Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1973).

41. In February 1971 CU published an advertisement for Consumer Reports

(PX-19) which included a number of illustrations of unhappy consumers, dissatisfied with their purchases because they had not read Consumer Reports before making their purchases. Each was identified by a first name and a last initial which was the first letter of the first name: Ann A., Bill B., etc. The advertisement depicted a woeful consumer, identified as Frank F., with a pair of loudspeakers that were obviously not Bose 901 loudspeakers. The plaintiff, perhaps exhibiting a certain degree of oversensitivity, contends that CU deliberately selected "Frank F." to go with the illustration of loudspeakers as a slap at Frank Ferguson, who was then president of the plaintiff. The plaintiff did not present any proof that a significant number of consumers were aware of Ferguson's status as president of the plaintiff, nor did it offer any evidence to show what harm the advertisement could have caused the plaintiff. In these circumstances the Court finds that CU did not publish the advertisement (PX-19) with Frank Ferguson in mind or with the intention of making a veiled reference to the plaintiff.

42. There was uncontradicted testimony to the effect that Seligson's patent had not been commercialized as of the time of trial. Tr. 8-59.

43. T4. 3-14. Florman referred to CU's editorial process as treading "the fine line between a strictly technical pre-

sentation and a readable report intended for laymen." PX-33, p. 3.

44. The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room."

45. The defendant did not argue, based on a literal reading of the above-quoted language, that the pledge to be free from bias applies only to rated products and not to products such as the Bose 901, which was not "formally rated."

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSE CORPORATION,
Plaintiff,

v. CIVIL ACTION
No. 71-481-C

CONSUMERS UNION OF U.S., INC.,
Defendant.

OPINION

December 30, 1981

CAFFREY, Ch. J.

This is a civil action, brought to obtain money damages and other relief for false statements published by the defendant about the plaintiff's product. This opinion supplements an opinion filed by the Honorable Anthony Julian, Senior United States District Court Judge and reported as Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249

(D.Mass. 1981). This opinion constitutes the Court's findings of fact and conclusions of law with respect to the damages issues in the case and renders a final judgment for the plaintiff on the product disparagement claim.

Summary of Prior Proceedings

The plaintiff, Bose Corporation (Bose), a manufacturer of loudspeaker systems and other audio equipment, brought this civil action in 1971 against the defendant, Consumers Union of United States, Inc. (CU), a consumer product testing and reporting organization. Bose claimed product disparagement, unfair competition, and Lanham Act violations on the basis of the defendant's publication of a rating of the plaintiff's product, the Bose 901 Series loudspeaker system, (the Bose 901). Judge

Julian severed the issue of liability from the other issues in the case and ordered that a trial be held to determine damages only in the event that the plaintiff prevailed on the other issues. 508 F.Supp. 1249 at 1251.

After an extended trial on the liability issues, the Court ruled that the plaintiff had failed to prove allegations of unfair competition and Lanham Act violations. Accordingly, the Court entered judgment for the defendant with regard to counts I and II of the complaint. With regard to the claim of product disparagement, the Court ruled that the plaintiff had proved that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity.

Id. at 1277.

The second half of this nonjury trial, considering the damages issues only, was held before the undersigned on June 4, 5, and 8, 1981. The following findings of fact and conclusions of law are based on evidence introduced at that trial. Together with Judge Julian's findings, these findings represent final disposition of the case.

Summary of Findings on Liability

The Consumer Reports Article: On pages 272 through 279 of the May 1970 issues of consumer Reports CU published an article entitled "Loudspeakers" (the Article). The Article contained CU's evaluation of the quality and performance of twenty-four different loudspeakers based on CU's tests of the loudspeakers. In a section (the Bose 901 Portion) boxed off from the main body

of the Article, under the heading "Some loudspeakers of special interest," appeared comments about the Bose 901. Id. at 1252.

The Article contained some complimentary statements about the Bose 901, but the effect of that language is more than outweighed by other statements that are clearly critical of the Bose 901. Id. at 1260. The Court specifically noted that the following paragraph undercut the positive impact of the Article:

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.

> On an impulse, we also played some monophonic records through the Bose. To our surprise, they too acquired the same special openness and size distortions as the stereo records.

Id. at 1260 n.20. See Id. at 1252-1254 for the complete text of the Bose 901 portion of the article. Judge Julian concluded that the Article, when read as a whole is disparaging.

Isolating statements in the Article for purposes of determining liability, Judge Julian found that while CU's use of the words "panel" and "panelists" was misleading, it did not cause harm to the plaintiff. Id. at 1260. Likewise, the Court found that the false implication that the accuracy of the tested loudspeakers was determined in an objective manner did not harm the plaintiff. Id. at 1262. CU's rating of the Bose 901 as "between the high- and medium-accuracy groups" was found to be only an

opinion which cannot be proven true or false. Id. at 1262. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

The Court made no finding as to whether the impact of that rating was harmful to the plaintiff.

Power Requirements

With respect to the power requirements of the Bose 901, the Article stated: If you do consider buying the system, note well this fact: The Bose requires a rather gigantic amount of power. CU recommends you have an amplifier of 50 watts per channel for the deepest bass response. Id. at 1263.

Judge Julian found that on the truth of this issue, neither party had produced trustworthy evidence. On the basis of the record he found that the matter was entirely

within the realm of speculation, and that accordingly plaintiff had failed to sustain its burden to prove the statement was false. Id at 1263-1264.

Size and Movement

The bulk of the testimony at the first proceeding concerned the paragraph quoted above, which Judge Julian found undercut the complimentary statements about the product and rendered disparaging the Article as a whole. The operative statement in the paragraph is "worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." Dissecting that sentence, Judge Julian found that the plaintiff had not proved that the statement about gigantic proportions was false. Id. at 1260. However, he found that the portion of the

statement that instruments "tended to wander about the room" was both false and disparaging to the plaintiff. Id. at 1268. Judge Julian specifically found:

> A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product. That such a harmful effect was intended is demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an even greater deficiency in the product.

Id.

The Court also found that the subsequent statement to the effect that the wandering effect might be annoying when listening to soloists enhanced the disparaging effects of the false statement. Id. at 1268 n.35.

Because Dr. Bose testified that the most frequent complaints he heard from dealers

and consumers concerned "the enlarged and wandering instruments and the statement about gigantic power required" the Court found that the false statement could not be considered a de minimus violation of plaintiff's rights. Id. at 1269.

Finding that the statement was false and disparaging, the Court went on to find that the defendant had not observed the required standard of care in making the statement. Applying the rigorous test enunciated in New York Times v. Sullivan, 376 U.S. 254 (164), the Court found that the plaintiff proved clearly and convincingly that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity. Id. at 1277. The remaining issue is what relief is to be granted

the plaintiff.

Scope of Relief

The tort of product disparagement, as distinguished from individual or corporate defamation, is a narrow cause of action. The interests protected are not those of the reputation of the corporation or the intangible concerns peculiar to individual reputation such as community standing, privacy and psychic well-being. Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249 at 1270-71; Note, Corporate Defamation and Product Disparagement; Narrowing the Analogy to Personal Defamation, 75 Colum. L. Rev. 963, 980-81 (1975).

A cause of action for product disparagement is made out only when the plaintiff has satisfactorily proved that it suffered

special damages flowing from a false statement concerning the nature or quality of plaintiff's product. Dooling v. Budget Publishing Co., 144 Mass. 258 (1887); Marlin Firearms Co. v. Shields, 171 N.Y. 384 (1902). The tort exists to provide redress only for tangible and direct pecuniary loss, a purely economic injury to which society accords a lesser value than reputational interests.

Under the law of both Massachusetts and New York "the plaintiff must allege and prove special damages -- specific proof of pecuniary loss -- before being entitled to recover." 508 F.Supp. at 1249 citing Dooling and Marlin, supra; see also Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435 (1960); Restatement (Second) of Torts Sections 623A, 633 (1976).

Special damages consist of the pecuniary loss that results directly from the effect of the wrongful conduct of the defendant, in this case, lost sales and expenses necessary to counteract the effect of publication. Id. Section 633. Lost sales are those sales which plaintiff would have made if the defendant had not disparaged the plaintiff's product.[1]

Injunctive Relief

Plaintiff in this action also seeks injunctive relief to prevent republication

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1. What sales might have been if defendant had published a highly favorable review is not the appropriate measure of damages. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Testimony on this question was admitted at trial as relevant for its insight into the cause and effect relationship between CU reports and product sales.

by the defendant of the false statement and to compel the defendant to publish a retraction.

Without reaching the question whether the first amendment would permit either type of injunctive relief in an action for product disparagement against a media defendant[2] I rule that injunctive relief is not warranted by the facts of this case.

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2. See, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Under Tornillo, the government may not require "balanced" reporting consistently with the First Amendment. In that case, the Supreme Court invalidated Florida's "right-of-reply" statute. That law required a periodical which had commented unfavorably on a political candidate to provide equal space free of charge to that candidate for response. The law's imposition of a penalty because of refusal to print certain copy, the Court found, was tantamount to a prohibition of publication of specified material and, consequently, violative of the First Amendment. Id. at 256. The Court noted that its holding did not depend on whether compulsory

After careful consideration of the record before the Court, I find that the false and disparaging statement complained of here was published more than ten years ago; that the defendant has not since republished or threatened to republish the statement; and that the plaintiff has failed to prove that the defendant is likely to republish the statement or that the harmful effects of the defamation persist to this day and that therefore there is no need for an injunction here to protect any interest of Bose. Therefore, I rule that the scope of relief

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balance imposed additional costs on the newspaper or actually restrained its publication of any material. Rather, the holding was based on the Court's recognition that the decision whether fairly or unfairly to evaluate the issues of public concern was exclusively committed to editorial control and journalistic discretion. Id. at 258.

in this action for product disparagement is limited to those pecuniary damages that plaintiff proves were the result of defendant's false and disparaging statement.

Causation

In a product disparagement case, the plaintiff must prove that special damages resulted from the publication and that the disparagement was a substantial factor in inducing others not to buy the plaintiff's product. Defendant seeks to apply the doctrine of the "libel-proof plaintiff" to bar recovery in this case. Such a plaintiff is unable to recover because defendant's libelous statements cannot cause harm to reputation in addition to the harm that is caused by truthful statement. See, e.g., Cardillo v. Doubleday & Company, 518

F.2d 638 (2d Cir. 1975).[3] Essentially, defendant argues that because statements in the article not found false and disparaging by Judge Julian also harmed the reputation of the Bose 901, loss of sales is not

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3. The Cardillo doctrine involves the limited reputational interest of habitual criminals. In Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) the Second Circuit cautioned against extending the doctrine beyond its basic factual context. Id. at 888-889. The Cardillo doctrine has been applied in product disparagement cases in recognition of the importance of First Amendment concerns over the limited reputational interests involved in this type of case. See, e.g., Simmons-Ford, Inc. v. Consumers Union of United States, Inc., 516 F.Supp. 742 (S.D.N.Y. 1981). In that case, the CU article contained much truthful information critical of the product's design and performance. The Court found that "the portion of the article challenged by plaintiffs could not harm their reputation in any way beyond the harm already caused by the remainder of the article." Id. at 750. Bose's claim here is not analogous to the claim in Simmons-Ford.

attributable to the statement that "individual instruments . . . tended to wander about the room."

Defendant's argument is inconsistent with Judge Julian's findings that the statement "could have no effect other than to harm the reputation of the product," and that the statement could not be considered a de minimus violation of plaintiff's rights. 508 F.Supp. 1249 at 1268-1269.

The "libel-proof plaintiff" defense should not be applied here unless defendant's non-actionable statements were the substantial reasons for a decline of sales of the Bose 901 system and, therefore, the wandering instruments statement could have had only a de minimus effect. Therefore on the basis of Judge Julian's findings and the record before me, I rule that

there is no basis in the record of this case for a finding that other statements about the Bose 901 were responsible for any determinable amount of lost sales to plaintiff. Plaintiff thus is not precluded from recovery by the "libel-proof plaintiff" doctrine.

With respect to the false statement about the wandering instruments, I find that the causal connection between defendant's statement and the plaintiff's losses is neither speculative nor remote. Plaintiff need only prove that the defendant's false and disparaging statement was a substantial factor in causing the loss. Restatement (Second) of Torts, supra, Section 632. The defendant may not unfairly place the burden on the plaintiff to prove that no other factor was involved or

to apportion with mathematical certainty and precision the dollar amount of the injury it suffered from each particular statement. Rombola v. Cosindas, 351 Mass. 382, 285 (1966).

I find that Bose's contention that the wandering instruments statement caused particular damage is not a recent invention. In the liability proceeding, Dr. Bose testified that that particular statement, the statement about gigantic power requirements, and the statement about gigantic instruments were the ones most frequently cited by dealers as reasons for decline in Bose system sales. I find that given Judge Julian's finding that most consumers would not literally construe CU's statements about 12 foot violins, Id. at 1265-1266, the portion of the statement that instruments seemed to

grow to gigantic proportions had no significant impact on Bose sales.

I find it less clear that the statement concerning gigantic power requirements had no impact on sales. I find that some portion of the pecuniary loss caused by the CU Article may possibly be attributable to that statement since most consumers owned amplifiers having power of fewer watts per channel than that suggested for use by CU. Bose attempted to counteract the effects of this statement by demonstrating that a low-power amplifier was adequate for use with the Bose 901 system. I find Dr. Bose's testimony on this point persuasive to the extent that such efforts were effective in reducing (but not eliminating) the volume of sales lost due to the gigantic power requirement statement. Accordingly, while

I find that the false statement about wandering instruments had a substantial impact on the reputation of the Bose 901, I find that some de minimus percentage of the total harm should be attributed to this non-actionable statement.

Other Factors

Defendant, through its witness Newell Garfield, introduced testimony attempting to show that other factors unrelated to the CU publication account for the decline in Bose sales over the relevant period. Garfield is a management consultant with no expertise in the loudspeaker industry. His highest formal education consisted of receiving a B.A. degree from Yale, majoring in Sociology and History. I find that his opinions, based on broad market data and economic surveys, were highly speculative.

I find that he was retained only three months before trial and had virtually no knowledge of the actual facts in this ten year antiquity of a case. I reject, without exception, his opinions as being pure guesses, all of which are favorable to the party which paid him very substantially. The only portion of his testimony I find factual is his opinion as to the effect which the introduction of the Bose 501 speaker may have had on sales of the Bose 901. The Bose model 501 speaker was a new product introduced during the relevant sales period. The Bose 501 was described to the public as offering at lower cost many of the performance advantages of the highly acclaimed 901 system. I find that introduction of such a product could be expected to divert some would-be sales of

the Bose 901 to the Bose 501. The effect on the Sales of the Bose 901 of the introduction of the Bose 501 is taken into account in the "Lost Sales" portion of this opinion. However, the defendant has made no attempt to analyze the relevant market in a manner which would persuade me to attribute to this factor more than a marginal effect in depressing sales of the higher priced speaker. Therefore, while this factor cannot be totally ignored, it does not preclude a finding that the CU publication and the false statement contained therein were the substantial cause of the decline in sales of plaintiff's product.

Quantification

The extent to which the product's reputation was harmed in dollar terms obviously depends on the relative importance of the

publication to potential purchasers about to make buying decisions. In the prior proceeding the Court found that "(t)he influence of Consumer Reports on consumers' buying decisions is substantial." During 1970 and 1971 Consumer Reports and CU had a very favorable reputation for independence, integrity, accuracy, and freedom from bias.

Subscribers to Consumer Reports tend to make buying their decisions after consulting reports published in Consumer Reports, and in 1970 millions of readers relied upon the product information published in the magazine. "Many consumers would not think of making a substantial purchase without consulting Consumer Reports." Id. at 1252. As Dr. Bose testified, there is a direct relationship between the reputation of a loudspeaker and sales of the product.

As the defendant's own "marketing expert" conceded on cross-examination, a good reputation tends to increase the sales of a product and a poor reputation tends to decrease the sales of the product.

Unlike the statement about gigantic power requirement, Bose could not minimize the effects of the false statement about "wandering instruments" because even if potential retail purchasers could be shown that the phenomenon was not observable during in-store demonstrations, they still would be concerned about its occurrence when other recordings were played in their homes. CU refused to disclose to Bose the names of the recordings on which the CU "panelists" supposedly had heard the "wandering instruments", so Bose was unable to refute that false claim by making

demonstrations using the same recordings. I, therefore, find that it is clear to a reasonable degree of certainty that the false statement about the wandering instruments was a substantial factor in dissuading a large number of consumers from buying the Bose 901 system.

Lost Sales

Based on evidence and testimony offered at trial, I find that publication of the May 1970 Consumer Reports article caused a decline in the rate of growth of sales of the Bose 901 system during the last eight months of 1970.[4]

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4. These findings are based on the testimony of Phyllis M. Larson, the Accounts Receivable Manager for the Bose Corporation, exhibits introduced in support of that testimony, and the testimony of Dr. Amar G. Bose. Mrs. Larson analyzed invoices of sales of the Bose 901 system from

Prior to publication of the CU Article, the Bose 901 had received the best reviews which ever had been given to a loudspeaker product, and Bose had projected that 1970 sales of the Bose 901 would be approximately 150% of 1969 sales. For the months of January through April, 1970, actual sales of Bose 901 systems to dealers for resale to members of the public increased to 155% of the sales for the corresponding months of 1969. During the last eight months of

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January 1, 1979, to December of 1970. The analysis excluded foreign sales, employee purchases, salesmen's purchases, dealer employees demonstration units, warranty replacements, and other no charge invoices. The totals represented net sales to dealers in the United States of Bose 901 systems for resale to the public. Dr. Bose testified as to the relationship between the sales figures compiled by Mrs. Larson and the CU article, based on his knowledge of the firm's history and the loudspeaker industry.

the year 1970, after the publication of the CU Article, sales were only 120% of sales for the corresponding months of 1969.

I find that if the defendant had not published the Article disparaging the Bose system, sales of the Bose 901 system during the last eight months of 1970 would have been at least 155% of sales made during the corresponding months of 1969; and in the last eight months of 1970 Bose would have sold at least 4,878 Bose 901 systems. Actual sales for the last eight months of 1970 were 3,780 systems. The difference is 1,098 systems. Taking into account the fact that some small portion of this decline in sales is attributable to statements about gigantic power requirements not proved to be false and that some marginal allowance must be made for market variables such as

introduction of the Bose 501, I find that at least 75% of this difference (approximately 824 systems) represents a loss of sales directly attributable to the defendant's publication of the false statement that "individual instruments . . . tended to wander about the room."

Bose would have realized additional net income of at least $129 per unit from the sale of each Bose 901 system which would have been sold during the years 1970-1972 in addition to the systems actually sold. The minimum gross income per system received by Bose from its dealers would have been $300 per system (assuming that the dealers took advantage of all available quantity discounts and discounts for prompt payment), and the variable costs of manufacturing, advertising, and selling the pro-

duct would have been $171 per system, leaving net income of $129 from each incremental sale.

Therefore if plaintiff had sold 824 additional Bose 901 systems during the last eight months of 1970, it would have realized additional net income of $106,296.

Expenses to Counteract False Statements

With respect to plaintiff's claim for special damages for the necessary costs of attempting to counteract false statements published by the defendant, I find: During the year following publication of the May 1970 CU Article, Dr. Bose spent at least half his working time for the plaintiff in attempting to overcome the effects of the false statement about the "wandering instruments." This included time spent in visiting Bose dealers throughout the United

States and attempting to explain to dealer personnel why the phenomenon reported by CU could not have occurred. The time spent by Dr. Bose in attempting to combat the effects of the false statement otherwise would have been spent on other aspects of the plaintiff's business. His salary during that time period was $18,000 per year. Therefore the cost to the plaintiff of the time spent by Dr. Bose in attempting to combat the false statement conservatively computed was at least $9,000.

I find that plaintiff is entitled to recovery of damages in the amount of $106,296 which represents the additional net income that the plaintiff would have realized but for the publication by the defendant of the false statement about the Bose 901 system. I also find that in

addition to the amount for lost sales, the plaintiff is entitled to recovery in the amount of $9,000 for expenses reasonably incurred by the plaintiff in an attempt to minimize the effects of the false statement published by the defendant about the Bose 901 system. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 408 F.Supp. 1219, 1234-1235 (D.Col. 1976), modified as to damages on damages on appeal, 561 F.2d 1365 (10th Cir. 1977), cert. dismissed 434 U.S. 1052. Accordingly, judgment will enter for the plaintiff in the amount of $115,296 plus interest accrued to the date of judgment.

Andrew A. Caffrey, Ch. J.

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NO. 82-1246

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION, Petitioner

v.

CONSUMERS UNION OF UNITED STATES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 20, 1983

CERTIORARI GRANTED APRIL 25, 1983

TABLE OF CONTENTS

Relevant docket entries, U.S.D.C. ... 2

Relevant docket entries, U.S.C.A. ... 6

Excerpts from Trial Transcript, U.S.D.C. 8

Testimony of:

Amar Bose 8

Arnold L. Seligson 82

Monte Florman 195

Alan Lefkow 222

David Marvin Green 260

Amar Bose (recalled) 334

Notation of Plaintiff's Exhibits 2, 7 and 10 338

Plaintiff's Exhibit 9 (excerpt) 339

Plaintiff's Exhibit 29 342

Plaintiff's Exhibit 35 343

Amended Final Judgment, U.S.D.C. 344

Judgment, U.S.C.A. 346

Notation of Opinions Below 347

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Relevant Docket Entries

Filing or Order Date	
Feb. 23, 1971	Summons issued; Complaint filed.
June 14, 1972	Plaintiff's Amended Complaint filed.
Oct. 15, 1973	Plaintiff's Consolidated Complaint (Amended) filed.
March 1, 1974	Defendant's Answer to Consolidated Complaint (Amended) filed.
May 9, 1975	JULIAN, S.D.J. Memorandum and ORDER dismissing counterclaims, ENTERED.
Jan. 8, 1980	JULIAN, S.D.J. RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ENTERED, denying motion in its entirety.
Feb. 19, 1980	JULIAN, S.D.J. Case called for Trial; Pltf's Opening; Pltf's Pre-Trial Brief, filing; Pltf's Evidence.

Feb. 20, 1980	JULIAN S.D.J. Civil Trial continues, 2nd day; Evidence.
Feb. 21, 1980	JULIAN S.D.J. Civil Trial continues, 3rd day; Evidence.
Feb. 22, 1980	JULIAN S.D.J. Civil Trial continues, 4th day; Evidence.
Feb. 26, 1980	JULIAN, S.D.J. Civil Trial continues, 5th day; Evidence.
Feb. 27, 1980	JULIAN, S.D.J. Civil Trial continues, 6th day; Pltf rests; Deft's Motion for Judgment Arguments; Motion denied; Deft's Evidence; Deft's Trial Memorandum on Evidentiary Evidence filed.
Feb. 28, 1980	JULIAN, S.D.J. Civil Trial continues, 7th day; Evidence.
Feb. 29, 1980	JULIAN, S.D.J. Civil Trial continues, 8th day; Evidence.
Mar. 4, 1980	JULIAN, S.D.J. Civil Trial continues, 9th day; Transcript of Trial Days 2/19, 2/21 & 2/22 filed; Evidence.

Mar. 5, 1980	JULIAN, S.D.J. Civil Trial continues, 10th day; Evidence.
Mar. 6, 1980	JULIAN, S.D.J. Civil Trial continues, 11th day; Evidence.
Mar. 7, 1980	JULIAN, S.D.J. Civil Trial continues, 12th day.
Mar. 11, 1980	JULIAN, S.D.J. Civil Trial continues, 13th day. Evidence.
Mar. 25, 1980	JULIAN, S.D.J. Civil Trial continues, 14th day.
Mar. 26, 1980	JULIAN, S.D.J. Civil Trial continues, 15th day; Evidence.
Mar. 27, 1980	JULIAN, S.D.J. Civil Trial continues, 16th day; Evidence.
Mar. 28, 1980	JULIAN, S.D.J. Civil Trial continues, 17th day; Evidence.
Apr. 4, 1980	JULIAN, S.D.J. Civil Trial continues, 18th day; Evidence.
Apr. 8, 1980	JULIAN, S.D.J. Civil Trial continues, 19th day; Evidence.

Jan. 21, 1981	JULIAN, S.D.J. OPINION ENTERED
Jan. 26, 1981	JULIAN, S.D.J. JUDGMENT for the Defendant as to Counts I and II of the complaint ENTERED.
Feb. 11, 1981	Case transferred to Chief Judge Caffrey.
June 4, 1981	CAFFREY, CH.J. Case called for civil non-jury trial first day.
June 5, 1981	CAFFREY, CH.J. Case called for civil non-jury trial second day; Pltf's evidence.
June 8, 1981	CAFFREY, CH.J. Case called for civil non-jury trial third day; Deft's evidence; Deft rests. Case taken under advisement.
Dec. 30, 1981	CAFFREY, CH.J. OPINION and Final Judgment entered. "1. Judgment for plaintiff on count III of the complaint in the sum of $115,296 plus interest. 2. Judgment is entered for the defendant on counts I and II of the complaint."
Jan. 8, 1982	Pltf's motion to amend final judgment, Filed.

Feb. 8, 1982	CAFFREY, CH.J. Amended Final Judgment ENTERED. Judgment is entered for the pltf. on Count III of the complaint in the sum of $115,296.00 plus interest in the sum of $85,788.11, and costs in the sum of $9,821.53, or a total of $210,905.64. Judgment is entered for the deft. on Counts I and II of the complaint.
Feb. 25, 1982	Deft's Notice of Appeal FILED.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Relevant Docket Entries

Mar. 10, 1982	Copy of notice of appeal and of district court docket entries, received and filed. Case docketed, notices mailed. (mn) Form sent to the Register of Copyrights in Washington, D.C. (mn)
Sept. 14, 1982	Heard by Davis, Campbell & Bownes, J.J. [1am]

Nov. 2, 1982	Judgment: The judgment of the district court is reversed. Opinion of the Court by Bownes, J., concurring opinion by Campbell, J. Notices mailed. [lam]
Nov. 12, 1982	Petition for Rehearing, received and filed. (mn)
Nov. 23, 1982	Order (Davis, Campbell & Bownes, J.J.) denying the petition for rehearing for reasons stated in said Order. Notices mailed. (cb)
Feb. 3, 1982	Petition for a writ of certiorari (Supreme Court No. 82-1246) filed January 20, 1983. (ar)
Apr. 28, 1982	Order of Supreme Court granting certiorari (#82-1246) April 25, 1983. (ar)

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

EXCERPTS FROM TRIAL TRANSCRIPT

(Title omitted in printing.)

* * *

[2-6] AMAR BOSE, Sworn

Direct Examination by Mr. Perry

Q. Tell us your full name, please?

A. Amar Bose.

Q. What is your home address? A. 17 Deer Run, Wayland.

Q. What is your occupation, sir?

A. I am a professor of electrical engineering at MIT; and I am chairman of the board and technical director and president of Bose Corporation.

Q. For the record, MIT is the Massachusetts Institute of Technology in Cambridge? [2-7] A. Yes.

Q. Where and on what date were you

born?

THE COURT: Excuse me. Am I to infer from the president and chairman of the board that you are the chief executive officer of the corporation?

THE WITNESS: Yes, your Honor.

Q. What is the date and place of your birth? A. November 2nd, 1929, Philadelphia.

Q. Where did you get your education prior to college?

A. My elementary and secondary education was in public school in Abington Township, a suburb of Philadelphia.

Q. What education have you had beyond the high school level?

A. The remaining education has been at MIT, bachelor degree, bachelor of science, master of science and doctor of science.

Q. In what years did you receive those degrees?

THE COURT: Hold it.

MR. PERRY: Yes, your Honor.

THE COURT: Are they all in the field of science?

THE WITNESS: Yes, all of them are in the field of science with a specialization in the [2-8] field of electrical engineering.

THE COURT: When were you appointed professor?

THE WITNESS: In 1956.

THE COURT: Were you appointed full professor at that time?

THE WITNESS: I started as an assistant profesor.

THE COURT: When did you become a full professor?

THE WITNESS: I believe, your Honor, that that was in 1971 or '72.

I'm sorry. Did you ask full or associate?

THE COURT: You said you were assistant professor in 1956. I skipped associate. You didn't mention that, so I thought you had a couple of promotions.

THE WITNESS: No, no. I became associate professor somewhere in 1971, '72; and full professor, I don't really recall, but about-- I am sorry, 1961 or '62 for associate and full maybe '66 or '67.

THE COURT: Yes. How old did you say you were?

THE WITNESS: Now?

THE COURT: Yes.

[2-9/10] THE WITNESS: I am 50.

THE COURT: Thank you.

Q. (By Mr. Perry) In what year did you receive your bachelors degree at MIT?

A. In 1952.

Q. In what year did you receive the masters degree? A. I received that simultaneously in 1952.

[2-11] Q What year did you receive your doctorate degree at MIT? A. I received that in 1956.

* * *

[2-13] Q. I take it you were appointed a member of the faculty at MIT immediately after receiving your doctorate degree, is that correct?

A. That's correct.

Q. And have you been a member of the MIT faculty continuously from 1956 to date?

A. Yes, although the first year that I was appointed, I was granted a leave of absence to accept a Fulbright Fellowship to teach abroad.

Q. Where did you teach during that year?

A. I taught in the Indian Statistical Institute in Calcutta, India, and the National Physical Laboratory in New Delhi, India.

Q. What has been the field or fields of your teaching as a MIT professor?

A. Electromagnetic field theory, statistical theory of communications, network theory, and acoustics.

Q. Could you tell his Honor what network theory is?

A. Network theory is the theory of electrical and electronic circuits, kinds of circuits that you would find in radios or amplifiers or control systems --

THE COURT: What do they call that?

THE WITNESS: We called it network theory.

Q. How long have you been teaching courses in acoustics at MIT? [2-14] A. Approximately 13 years, I believe, 1967 I

started, or '66.

Q. And you're still teaching acoustics courses at MIT? A. That's correct.

* * *

[2-19] Q. Dr. Bose, are you the author of any text books which are used in universities and colleges? A. Yes, I am.

Q. What?

A. I'm the author -- joint author with Professor Kenneth Stevens at MIT of the book "Introductory Network Theory." I think your question specifically asked "that are used." The book was published by Harper and Row in 1965, I believe, and it's now out of print so I can't say for sure it is being used anywhere at the moment.

Q. At one time, was it used in a number of colleges and universities?

A. Yes, here and abroad.

Q. Have you written any papers in the field of acoustics that have been published?

A. Yes, a paper for the Audio Engineering Society in 1968 and a paper for the MIT Technology Review, two papers, in 1973.

Q. Are you the named inventor on any issued patents? [2-20] A. Yes, I am.

Q. Approximately how many? A. I believe 12 U. S. patents.

THE COURT: Were any of them in the field of acoustics?

THE WITNESS: Yes, about half, your Honor.

Q. Do some of those relate to loud speakers? A. I believe most of them do, most of that half.

Q. Specifically, do you hold a patent or patents that relate to the Bose

901 loud speaker with which we're here concerned? A. Yes.

Q. What professional organizations do you belong to?

A. I belong to the Audio Engineering Society and I'm a fellow of the Institute of Electronics and Electrical Engineers.

Q. Commonly called I.E.E.E.? A. Yes.

Q. Do you belong to any engineering honorary societies? A. Yes.

Q. What ones? A. I believe, Eta Kappa Nu, Tau Beta Phi, Sigma Psi, I believe that's all.

Q. Dr. Bose, have you received any awards or honors for your teaching at MIT?

[2-21] A. Yes. In 1963 or '64, I received the Baker Memorial Award for the best teacher at MIT.

Q. I guess it's hard to top that.

But, are there any others?

A. Yes, I received the Western Electric Award of the American Society of Engineering Education. I believe that was also for outstanding teaching in the field of engineering and that was probably 1965.

Q. Have you held any special chair at MIT? A. Yes.

Q. What was that?

A. The Lebel Chair. Mr. Lebel was a man who did work in acoustics. In fact, I believe he had to do with the founding of the Audio Society. I'm not sure but he left money for a rotating chair at MIT and I was the first one who occupied that chair for two years.

Q. Dr. Bose, have you lectured in the field of acoustics at various colleges, universities or institutions?

A. Yes.

Q. Could you tell us some of them, not all but just give us an idea of some of the places?

A. Ones that I recall -- of course, MIT, Boston University, Johns Hopkins, Applied Research Laboratory of Johns Hopkins University, Applied Physics, APL, of Johns [2-22] Hopkins University. I know there are other -- well, excuse me, did you ask me just universities at this point?

Q. And professional organizations.

A. Yes. A number of presentations across the country, different chapters of the Audio Engineering Society. I lectured before the Institute of Electrical Engineers. That's IEE of Australia in Sydney before the Corresponding Society in New Delhi, India. I lectured at the University of Basel in Switzerland. That's what I can recall at the moment.

There were more I know.

* * *

[2-23] Q. (By Mr. Perry) If you put aside all modesty, Dr. Bose, would it be fair to say that you are generally recognized as one of the leading experts in the world on design and theory in loudspeakers?

A. I believe that is correct.

* * *

[2-27] Q. As a result of the becoming interested in loudspeakers when you bought one, did you embark on a program of research and evaluation in the loudspeaker area? A. I did.

Q. And how long did that last? A. Until the present.

Q. All right. Did you conduct research at MIT on loudspeakers after you returned from your Fulbright teaching job in Calcutta? A. Yes.

Q. And without going into all the details, would you give us a general picture of the scope of that work as it existed from 1957 until 1964?

A. From 1957 until approximately '59 or '60 it constituted primarily making measurements on products that were then available and trying to understand the issue of measurements versus perception. By 1959 we could show that many statements that were in textbooks were not, in fact -- [2-28] they were old and they were not any longer applicable to the design of speakers. And at that point the project -- up until that point the project was a nighttime project and weekend project. After that it became an official project at MIT in the sense that Dr. Wiesner, who is now president of MIT, authorized that we could have students, we could use funds in the research

laboratory of electronics and have faculty also work on the problem. And the problems then centered all about the relationship between the measurements and perception.

Q. That work continued at MIT until at least 1964?

A. Yes, it continued in force until about '67 -- well, maybe even '70; and then it diminished in its activities. And in fact those programs, many of them, are now being carried out at the company.

Q. All right. When was the Bose Corporation organized? A. In 19-- in the summer of 1964.

Q. Were you the founder of the company? A. Yes.

Q. And, of course, it was named after you? A. Yes.

Q. And you own today the majority of the stock? A. I own about 60 percent.

Q. What offices have you held in the corporation?

[2-29] A. I have held alternately the office of president, always the office of chairman, and the office of technical director. I was, in the early days, also acting as the marketing, you might say, director.

Q. You were in charge of sales as well as the research in the early years of the company?

A. Yes, we were not large enough to have other people at that time.

Q. Where did the company have its original place of business? A. In 17 Erie Drive, East Natick Industrial Park.

Q. In 1970 did it move to another location? A. Yes.

Q Where? A. One Strathmore Road, Natick Industrial Park.

Q. What is the present location of

the company? A. 100 Mountain Road, Framingham.

Q. When did you move to the Framingham location? A. In 1972, I believe.

Q. What has been the nature of the business conducted by the company in general?

A. Its primary business is the design and production of loudspeaker systems. Its business has included electronics research and development for the Army, [2-30] for the Air Force, for the Navy, Department of Transportation, Atomic Energy Commission, and NASA.

Q. Has it also manufactured some other audio components or equipment besides loudspeakers?

A. Yes, it has designed receivers, which it does not also fabricate. It has designed and fabricated power amplifiers,

both for home use and professional musicians; and mixers, which is a device that musicians use, and loudspeakers for use by professional musicians.

THE COURT: What is a mixer?

THE WITNESS: A mixer is, your Honor, an electronic device in which when you have more than one microphone, you pass these microphones through a panel and you can mix part of the sound from this one and part of the sound from the other one to go to one loudspeaker, for example.

Q. What was the first loudspeaker that the Bose Corporation sold? Did it have a number?

A. Yes, it did, a Model 2201.

Q. When was that on the market?

A. I believe, Mr. Perry, that came on the market in 1966.

Q. And how long did you continue to sell the 2201?

[2-31] A. For about 18 months to possibly as high as -- I think that is it, about 18 months.

Q. Was it replaced by another product, another loudspeaker?

A. Yes, yes.

Q. And that was the Bose 901 loudspeaker? A. Yes.

Q. And that went on the market when?

A. Either late 1967 or early 1968.

Q. Right around the turn of the year? A. Yes.

Q. And who designed the Bose 901? A. I did.

* * *

[2-47] Q. Dr. Bose, you have been engaged in the design of loudspeakers continuously since 1956, is it?

A. Yes.

[2-48] Q. In your experience, is there a general goal or desired result which

designers of loud speakers for home stereo systems try to achieve?

A. Yes.

Q. What is that goal?

A. I believe and I hope that all designers are striving to create a loud speaker which comes as close as it is possible to producing in your home the sensation that you would get if you were present at the live performance of the music.

Q. Was that your goal when you designed the Bose 901 loudspeaker? A. Yes.

* * *

[2-84] Q. By April, 1970, Dr. Bose, how many retail dealers did you have handling the 901?

A. I believe we had about 200.

THE COURT: By what year?

THE WITNESS: By April -- by 1970,

your Honor.

Q. Now, I don't want any detailed sales information [2-85] at this point, but generally what was the trend of your sales from the time you put the product on the market until April 12, 1970?

A. It was excellent. The sales were increasing, as I recall, by at least 50 percent, my recollection is now; about 50 percent per year.

Q. That is 150 percent of the prior year? A. Yes.

* * *

[2-95] Q. Now, directing your attention to the next sentence, which reads as follows: "Worse, individual instruments heard through the Bose system seemed to grow to gigantic [2-96] proportions and tended to wander about the room. For instance, a violin appeared to be ten feet wide and a piano stretched from wall

to wall." Dr. Bose, could a listener hearing music played through a Bose 901 loudspeaker system hear instruments which appeared to grow to gigantic proportions and wander about the room?

A. Absolutely not.

Q. Could that phenomenon be heard with any other type of loudspeaker? A. No.

Q. Is it scientifically possible for those phenomenon to actually exist? A. It is not.

* * *

[2-98] Q. (By Mr. Perry) Dr. Bose, would you now explain to the Court why it is scientifically impossible for a loudspeaker to cause instruments played through it to appear to be of enlarged proportions or to wander about the room? Would it be helpful to use the board again?

A. Yes, it would.

MR. PERRY: If I may, your Honor, I think I'll number these sheets and then if we want to refer back to any of them by numbers, we can do so.

THE COURT: Very well. I think that would be helpful.

MR. PERRY: I'm putting the numbers on in red in the corners. May the witness step down to the easel, your Honor?

THE COURT: Yes.

THE WITNESS: Again, the starting place--

THE COURT: Can counsel see this?

MR. BEIL: Yes, your Honor.

THE WITNESS: The starting place is the [2-99] live instrument which the loudspeaker is supposed to be reproducing. If we can understand what it does, then we are ready to understand

what the loudspeaker does. In fact, maybe it would be helpful -- let me make an outline of the steps one needs to arrive at that answer, as I see it. One is to talk about the live instrument, live instruments; that includes instruments also in the voice. That's a musical instrument as well. Two, to look at loudspeakers; and three, to finally look at a test for any theory which could be proposed that would suggest the instruments as reproduced through loudspeakers could in fact grow and wander. So let's start with number one. Actually, I think we've, in the course of discussion this morning, covered some material with respect to number one that we can call on. Upon second thought, upon looking at it, it looks like a complicated diagram. If necessary, I will draw it over. Let's see if I can just

recall the conclusions that we drew from this. The blue curve, which was a circle, was used to indicate that an instrument, in this [2-100] case, the violin, radiates sound equally in all directions at the low notes. If it's played in the center of a room, the radiation in this direction is the same in that direction or another direction. That was the blue curve. As you go up in frequency, the instrument becomes more directional. It radiates strongly, perhaps, for one note in this direction, more weakly in another direction. As you change notes on the scale, in fact the directions at which the instrument radiates may change. It may radiate strongly in this direction and weakly in the direction that it was formerly strong.

THE COURT: What is the reason for

that?

THE WITNESS: Basically, the sound is emanating from, as we said, the whole board of the instruments; and the different parts are not vibrating together. So what happens is, for example, if one part is vibrating differently from another, if you look in this direction, the waves that are launched might add; and in another direction, the waves that come from two parts of an instrument may cancel. Since that vibration pattern changes [2-101] with frequency, the directions which the waves add and cancel change also.

Q. If I may interrupt just for the record, you are referring now to Sheet Number 4 of the drawings on the easel, right?

A. Yes, I am. Now, let's consider the other essential part to any kind of

music system, be it live music or reproduced music. That's the human being, the observer. Let's consider now we take this violin and begin by listening to it outside.

THE COURT: What do you mean, outside?

THE WITNESS: Outdoors. Just imagine for a moment that the violinist is playing here, and he's outdoors and we are listening some distance from him. All the sound that we get outdoors from him is what we call direct sound because it comes from the instrument to him, other than the earth, which isn't that good of a reflector. The assumption is it's outside, not in the city, in the open air. So there are no other paths that the sound could go through and come to the observer. So the angle -- that's what your ear is sensitive -- your ear

can sense angles from which [2-102] sound comes to you. Unlike vision, it cannot tell what the width of something is unless you know distance, and the ear cannot tell you except by other associations from other senses. So all the sound is coming to you from -- let's take the whole violin -- from a very, very narrow angle; and that angle, of course, depends upon how far away you are from the instrument. Now, if I am closer to that instrument, the angles will be larger because the sound is coming from the same area. If I'm further away, the angle would be smaller. But of course never has anyone, to my knowledge, observed that the violin is larger when it's closer than when it is removed. Let's take this violinist and put him in the center of a band shell.

Q. You are going from Sheet 8 to

Sheet 9, right?

A. Such as we have here like on the Charles River. Again, he is standing here and the audience is somewhere out here in front of the shell. Now, the sound is arriving from that violinist in a totally different manner. The purpose of this shell is to behave with respect to sound in the same way that a headlamp in an [2-103] automobile behaves with respect to a filament.

THE COURT: It's a reflector?

THE WITNESS: It's a reflector. The headlamp, the filament sends out light in all directions, and it reflects and comes to you when you look at the headlamp illuminated. What you see primarily is light from one end to the other. The mathematics of sound reflection from a surface are the same as the mathematics of light from a mirror. In other words,

if you have a hard surface that reflects very well, the equations are the same. For example, in light we all know that the angle that the light is incident on the mirror is equal to the angle of the reflection. The same thing holds for acoustics, which is a much bigger thing than the headlamp, but it's doing the same function. Sound is coming sometimes from here, sometimes from here, sometimes from here, and some bit of it directly from the instrument, a very small portion compared to what is going out in all directions. Now, this observer, and I think almost everyone in the room must have had the experience of sitting, enjoying music in front of a band shell -- now, the angle from which the sounds are coming [2-104] to your ear is much larger than it would have been if the band shell were not there and you were

just perceiving sound from this very, very narrow angle. But again, no reviewer or concert reviewer or anyone, for that matter, that I'm aware of, has ever suggested remotely that the violinist is now 50 or 70 feet wide, which is the width across the front of the stage from which the music is coming to the ears of the listener. So that, of course, had been observed -- if a person were sitting here using the auditory senses, to him the instrument would not be 50 feet wide -- well, you couldn't tell width unless you know distance -- but he would have a larger angle. Remember from back here -- do I refer to these, your Honor, as exhibits or --

Q. I think if you call it Sheet 1, Sheet 2, whatever.

THE COURT: Call them charts.

THE WITNESS: From Chart 4, we

observed that at some frequencies the sound is strong in one direction and weak in another direction, stronger here, weaker here. So going back to our band shell, what happens is that some frequencies, some notes on the musical scale, the violin will [2-105] radiate very strongly in this direction and very little, perhaps, in this direction or the other directions. So most of the sound that the listener will get from that musical note is coming from over here. Another note on the scale may cause that situation to change and the maximum energy would be radiated in this direction, and to the listener it would come from that angle. Nobody, to my entire knowledge, has ever reported that, while sitting in front of a band shell, they perceived that the violinist wandered about either the shell or about

the environment in which the listener was. Now, we have gone from a small angle here of the same instrument to a larger angle. Now let's go to a still larger one. That's the one that we found -- I believe we talked about that this morning. Let me see. That we find in a concert hall. We mentioned that this is -- excuse me, please. This is Chart 5. We mentioned that in a concert hall, as a result of the energy that was going out in all directions, that, as a result of that, you get reflections from all sides, including [2-106] the rear; and if you measured how sound is incident upon the ears of a listener in a hall, you would find almost equal amounts coming from all directions. So for the violinist outside, we perceived a narrow angle of those sounds, for the violinist in the band shell, a wider angle; and now the

violinist in a concert hall, an angle that goes in circles completely. No one, to my knowledge, has ever reported that when they are in the concert hall, the violin has become so enormous that it's in circles. So what is happening here? What's happening is that the angles through which the sound wave arrives at your ears have nothing to do with one's perception of how wide the musical instrument was that launched those sounds. Let's take this same violinist and take him into one more environment. We will put him in a room, and I think many people have had occasion to experience things like this. Let's suppose he is playing here in an auditorium, and I am now here in another room as an observer, listener.

[2-107] A. And there are two doors to this auditorium. The violinist is some-

where in here. He may, in fact, be hidden from sight from either door. He may be sitting in some position here. And I have the opportunity to perceive him through the two doors. Let these doors be, for example, ten feet wide. Nobody has ever perceived, you have had this experience, that the violin itself is ten feet wide because the sound is coming to you from two areas now instead of one. And here is an example in which you may get no direct sound whatsoever. So, again, the angles through which the sound comes to you are independent of your perception of the musical instrument. No one has ever perceived that that man, that that violin was ten feet wide, the width between the two doors, for example, and no one would perceive that, in fact, that this violinist was wandering about the room in

which you were observing. Now, going back for just one second to the concert hall. We showed what happened when the violinist was here. If that same violinist were moved to the corner, for example, the spatial patterns of radiation out of the corner would be totally different than the ones that are here, [2-108] but he would still be recognized as a violin of the proportions that we have learned from our other acoustics, an auditorium, rather, and to be sure, even if he were in the corner radiating sound from another direction, another note might be radiated out directly in the direction of the listener. Nobody has ever perceived the violinist to either become ten feet wide or to wander about the concert hall as he is, in fact, playing.

Now, let's go to the second topic on

the list that we had, which was loudspeakers. I guess if I had to say what is the most important thing that I have learned in the years of working in speakers, it is that a loudspeaker is, in fact, a musical instrument. Now, at first that sounds strange and would have sounded strange to me if somebody had said that in 1956, but the more I worked with them, the more I realized that. Let's look at the similarities. A loudspeaker of any design radiates low frequencies equally in all directions. A loudspeaker of any design, except a perfectly spherical one becomes directional at high frequencies. It radiates [2-109] some frequencies more strongly in one direction than it does other frequencies. A loudspeaker of the design like the 901, for example, will radiate some frequencies strongly both

front and to the rear sides and low frequencies omnidirectional.

And what is the other fundamental similarity? I think even at a philosophical level that is important that we understand because basically once you realize the loudspeaker is in fact a musical instrument, then your attitude towards the design evaluation is very much, I think, altered. Namely, we spoke this morning that we could play Beethoven's Fifth Symphony if we moved our hands fast enough. Every musical instrument launches its sound by starting with a mechanical input that causes a vibration. You can think of a musical instrument as something in which I apply mechanical motion and I get out acoustic energy. A mechanical input, meaning -- applying to the violin -- going up and down the fingerboard with my left hand

and the bow with the right hand.

What is a loudspeaker? Well, in fact, if we go back early enough the first loudspeakers [2-110] fit that system very well. The Edison-type loudspeaker used the mechanical scratches on a rotating disc and the speaker caused the amplification and production of acoustic energy from mechanical energy. As our technology advanced, we developed the kind of loudspeaker about which we spoke this morning, which has electrical terminals here and produces acoustical energy out.

So this, let us say, is a present day loudspeaker, and this is an instrument. Now, actually the loudspeaker has been recognized in the last 15 years as an instrument by the people who compose for it, the people who compose synthesized music. There are organs that are

snythesized. And again, I might point out that the signal that goes into this loudspeaker has nothing to do with size at all. If you synthesize an organ, which you can do today perfectly, you can make the same electric signal from a little keyboard that you can from a giant organ. When the person listens to the output of any loudspeakers he cannot distinguish the sounds between the two. And clearly the keyboard occupied a very little space; the organ a very large space.

[2-111] So fundamentally the loudspeaker is a musical instrument and as such its object is to take an input and provide as well as possible the sound that you desire as its output. The design of that speaker, I believe, must and it has in the 901 try more and more to achieve the kind of spatial incidence

that one gets in a live performance when you are in fact in your living room; that is, you get more sound energy from wider and wider angles. So that is how this design that we spoke of this morning operates.

THE COURT: Would that be Sheet 11?

MR. PERRY: I will put the numbers on if I may.

THE WITNESS; So, this loudspeaker for musical instruments sits in the room and it radiates sound patterns that hopefully cause you to receive a larger angle of incidence than you would if you had a conventional loudspeaker in which you had a beam at high frequencies that might be pointed directly at you, which is not the situation that you receive in the concert hall.

Now, we are ready, I think, to address [2-112] the key issue of why it

is not possible. There is a very, very simple test that one can make for anybody who could actually, if anybody ever did, propose a theory that loudspeakers of any design could cause the instruments to be enlarged and could cause sound to wander about the room. And the test is very simple. The first thing you must see about the theory is study it in depth, in fact, and find out does it predict the same thing for live instruments. And if it doesn't predict that, I need not go into the theories because in fact the loudspeaker is doing the same kind of thing that live instruments do.

Well, second part, if it does after all the theory -- either does or does not predict this -- if it does not predict it, we have a serious problem and it cannot be valid because a speaker is a

musical instrument and it does the same thing as a musical instrument. If it does predict it, we have an incredible problem because then it also predicts things that we have ourselves never experienced and that are, in fact, contrary to our daily experiences.

To simply illustrate that, I think [2-113] instead of the violin we will just take a look at the human voice. It is amazing the commonality of all these sources. The fundamental pitch of a male voice is about 120 Hertz, 120 cycles per second, that pitch. Those low frequencies just like from any musical instrument, just like from any loudspeaker radiate omni directionally, again a circular pattern indicating direction.

The highest frequencies the human voice is capable of radiating occur by turbulent airflow caused by restrictions

either with the tongue, the lips or the teeth. These represent high frequencies which are generated by air flowing in the turbulent form. And those, like a loudspeaker, are directional, highly directional. When I speak, for example, to all of you in this room, each of you is getting a different proportion of the direct sound to reflected sound, a different ratio of reflected sound depending upon which way I am pointing. Your Honor is receiving maximum direct sound at the moment; and now Mr. Hieken, you are receiving the maximum direct sound. I can control that ratio of direct sound to reflected sound, that sound which goes first to [2-114] a surface and then to you very simply by turning my head. For example, if I may do that -- let me move that thing for a second. I am here at the moment now and

I am giving you maximum direct sound, directly at your Honor. If I, in fact, turn my head in this direction, the majority of the sound is going to you via one reflection.

Now, I think your Honor or anyone else in the courtroom cannot perceive that I myself have grown to be ten feet wide, nor can anyone perceive that I am, in fact, as I am speaking to you wandering about this courtroom. So again with the natural sounds that are emanated by musical instruments, the voice, the loudspeaker, which is an instrument, are such that these phenomenon do not happen. If any theory were presented to say that it does happen, that theory must be first checked to make sure that it predicts that it would happen to all its brothers, the voice and the musical instruments. And if it did, we would have a real

problem because that is contrary to our total experience. And that, your Honor, is why I say [2-115] it is not possible to make that observation as a result of a loudspeaker.

Q. Dr. Bose, is it possible to make a recording which when played through a stereo system will make an instrument appear to go back and forth between the two speakers?

A. Yes, it is. And again to understand this, let's go back to where it al begins and to where it all ends, musical instruments. Suppose now I had two violinists, one here and one beside him. And suppose they arranged to play the same composition; and suppose the first one on the left, which I will label as you look at it L and the one on the right, R. Now, we prearrange with these violinists and we are standing out here

in front of them. We prearrange that first the one called L will play louder and then a little while later he is simply decreasing the pressure on his bow and R, the violinist called R will increase his and play louder. To be sure, you will perceive the sound moving from the left to right. Now, when you have a stereo system and you make recordings, what happens is the [2-116] following thing: You have again a stage. I will use the bottom part of Graph Number 13 just to indicate quickly a stage here. This has nothing to do with the top part. You have microphones. Today it is more common to use just two microphones. It used to be many, many microphones, but you have two microphones here. Sometimes they are directional, pointing out in these directions; that is, they receive more energy from here to

the right microphone and more energy from there to the left. There are many configurations of these.

[2-117] THE WITNESS: (Continuing) Now, these two recorders are kept as separate channels in the recording process, and eventually they produce two tracks on a record; but in general, there is a process called mixing them in between, which your Honor asked me about this morning. And that is a box in here which you again produce two outputs, but now you may get the output that comes out here, the left side, L prime and right, R prime, may not be just the left channel and may not be just the right channel. They may mix some of these together to get whatever effects they wish. Eventually, the L prime and R prime are fed to two loudspeakers. I am drawing too low. It's going off the chart. They

go eventually to two loudspeakers. With a bit of bias, I'm drawing them as 901s. Well, what happens is, if this mixer, while the recording is being made, changes so that he puts most of the signal into here and very little into this loudspeaker, of course you will hear the left loudspeaker play. If he puts more into the right speaker in the recording mix and less into the left, if you were to change it, of course, that would be terrible practice in [2-118] recording, you could do it. He could cause the sound to move back and forth between the speakers. But of course he would cause that same effect on any loudspeaker, just as you would cause it in the real world with two violinists playing. It would be independent of the loudspeaker. Also, the only way it could move is back and forth is in the plane.

It could never move about the room. We know of no theory that could project my sound as if it were coming from the seat of Mr. Hieken. The sound would not wander about the room. But if you wished to make a trick recording or if you made a poor recording, you could move back and forth between two speakers. But it would so move on any speakers used.

THE COURT: Does that phenomenon occur sometimes when you are playing a stereo and the sound seems to go from one loudspeaker to the other?

THE WITNESS: In the early days, your Honor, when stereo was first developed in 1956 or 1957, to show its virtues, manufacturers and everyone involved used to make what they call ping pong effects, the ping pong ball going from here to there, locomotives that would come [2-119] through your living room from the

left and out the right side. All good recording techniques today try very much to minimize that, and it was not a factor; nor was it in '70. Excuse me.

Q. Go ahead.

A. Just one thing this diagram suggested to me that I should remark on. That is if you make a source, a musical instrument by itself which cannot cause the sounds to move, two of them cannot cause the sound to move unless you play the game of increasing the strength or decreasing it or one or the other. One is incapable of moving the sound about the room; two are impossible.

* * *

[2-124] Q. Could you tell us about how many times since you first developed the 901 loudspeaker you have listened to music played through a 901?

A. I own them in my home. Thousands

of times.

Q. Have you ever heard in all those thousands of times what sounded to you to be a widened or enlarged instrument or an instrument wandering about the room?

[2-125] A. I have not.

* * *

[2-141] Q. Dr. Bose, after the Consumer's Union article appeared in May, 1970, did you personally go out into the field and talk to dealers about the impact of the article in the marketplace?

A. I did.

Q. And how much of your time during the year following the appearance of the article did you spend on that activity?

A. Almost all of the time that I was not teaching.

Q. And over what geographical area did you travel --

[2-142] THE COURT: Let me ask this

question: How much of the time were you not teaching?

THE WITNESS: I was teaching at that time, your Honor, I believe Monday, Wednesday, and Friday, which left four days in the week to work on the other aspect.

THE COURT: All right.

Q. And did you sometimes or customarily spend the other four days trying to combat the effects of this article?

A. Oh, yes.

Q. And where did you travel to meet with dealers? A. From coast to coast.

Q. Coast to -- Literally from the Atlantic to the Pacific.

A. Literally.

Q. And did you visit -- well, about how many dealers did you visit? Do you have any idea now? A. No.

Q. When you visited dealers, did you talk to the sales staff about the effects of the article? A. Yes.

Q. Did you also talk to retail consumers, that is, people who were purchasers or potential purchasers of loud- [2-143] speaker equipment?

A. In the environment of the store, there are normally consumers; and whenever that was the case, I take advantage of speaking to them.

THE COURT: In the course of a week, approximately how many roughly would you speak to?

A. What I would often try to do, your Honor, is make a trip, for example, to New York or to a place that I could go and return in one day on a Tuesday or a Thursday; and the long trips I would take, if we had a day holiday from MIT, for example a Monday holiday, I could

leave on a Friday night and return on a Tuesday evening. In an area like in New York you could visit a number of stores. I could visit up to about maximum of three stores in a day when I was in an area. I have never added all this up.

THE COURT: How long a period of time did you do this?

A. The most critical period was from the time of the report through the following Christmas.

Q. That was from May of 1970 to December 25 of 1970?

A. Yes. It didn't exactly end, but that was the time that we felt was absolutely critical to overcome the [2-144] problem.

Q. All right. As a result of the visits you made to dealers, talking with dealers, talking with salesmen, talking with consumers, and observing, yourself,

personally, did you form an opinion as to which of the statements in the article had been most damaging to the Bose 901?

A. Yes.

Q. What was your opinion?

MR. BEIL: Your Honor, any such opinion really is a compilation of a lot of talking; that is, a lot of hearsay.

THE COURT: Perhaps it might be well -- "most damaging" calls for a conclusion, really, but perhaps with respect to what aspects of the criticism made by CU --what was the most frequent complaint made?

THE WITNESS: The enlarged and wandering instruments and the statement about gigantic power required.

THE COURT: Did they use those very words?

THE WITNESS: Yes, your Honor, those very words.

* * *

[2-147] Q. You had some communications with management personnel of the defendant in which you asked for a meeting to discuss the May 1970 article, did you not?

A. That's correct.

Q. And you had such a meeting on June 3 of 1970? A. That's correct.

Q. Where did the meeting take place?

A. At C. U. facility in Mt. Vernon.

Q. New York? A. Yes.

* * *

[2-156] Q. After you left the listening room where did you go?

A. We then assembled for the main purpose of the visit and that was the meeting, back in the -- back in the original building.

Q. Who was present during the meeting?

A. Well, we met at a long table and -- you want me to draw it?

Q. Just describe who was there?

A. All right. To my right -- the table was long in this direction. To my right was Frank Ferguson. To my left at the head of the table was Dr. Walker Sandbach. Across, I think, Mr. Seligson. Next to Mr. Seligson was Mr. Nagel, I believe his name was Karl. Next to Mr. Nagel was Dr. Colston Warne and at the head of the table at the other end was Mr. Monte Florman.

* * *

[2-161] Q. All right. Now, in the course of the meeting did you ask some questions about who had heard these supposedly enlarged instruments as described in the article?

A. Yes.

Q. And who responded to that? A.

Mr. Seligson.

Q. What did he say? A. Do you want my question or what?

Q. Yes, why don't you give us the conversation about that subject matter, if you will. I am trying to cut out some of the extraneous matter.

A. I asked the questions in a sequence on purpose. And one that I asked first was that if the entire panel [2-162] had heard those enlarged instruments and wandering instruments, to which the answer was yes. I asked did the instruments just move back and forth between the two speakers along the wall or did they actually move out into the room. And the answer was, oh, no, they moved out into the room. Then I asked how many members were in the panel because I had read the article that Mr. Seligson had written about the 12 panel

members.

* * *

[3-2] Q. Dr. Bose, at the end of the day yesterday, you were telling us about what happened at the meeting at Consumers Union's headquarters in Mt. Vernon, New York, June 3, 1970, and to put things back in perspective, you were telling about some questions you asked about the panel which allegedly heard the widened and wandering instruments. And you had said that you asked if the entire panel had heard the enlarged wandering instruments and the answer was: Yes, and you asked whether they moved back and forth between the two speakers or moved out into the room and the answer was: They moved out into the room. Then you asked how many members were in the panel. What reply did you receive to that question?

A. Mr. Seligson paused at that point and then looked [3-3] to his left to Mr. Nagel and replied "two," and then had a small discussion with Mr. Nagel as to whether a third person had passed by at the time they were doing this.

Q. What was said next about that subject matter, if anything?

A. I believe at that point I asked that, since the entire panel -- oh, no, I think the next question that I posed at that point had to do with the number two. I asked how is it that this so-called panel is only two in number when, in fact, your Stereo Review article of -- I believe February 1959 -- Oh, let's see, just a moment -- 1969 said that there were twelve people used in the panel and, in fact, a picture was shown. The answer from that did not come from Mr. Seligson. Mr. Florman responded to that and said

words to the effect, "We don't have to do what we say in any article. We can test in any way we want. I believe there was no more discussion of why they showed twelve in their article on how they test speakers and why only two happened to have listened into the 901. At that point, I asked if -- or I commented that if the entire panel, even if it were only the engineer and his supervisor, Mr. Nagel, had heard [3-4] this effect of the enlarged instruments and instruments wandering about the room, I'm sure that all the members in the room would like to hear that; and since they had indicated that they had the speakers, I requested that they set them up and give a demonstration of this. That was just dismissed. They refused to do that.

Q. I show you, Dr. Bose -- had you finished your answer?

A. I believe that I requested to hear them at another time also on that same day.

Q. You asked for a demonstration of the Bose 901s which they had tested?

A. That's correct. My recollection is that I asked for that at least twice, but I specifically recall having asked for it on this particular occasion. I also suggested that we make or submit the speakers to an independent panel in which CU could participate to see if any of the panel members could, in fact, witness enlarged instruments or instruments that wandered about the room; and Florman, I believe, was the one who responded to that, saying, "We don't" -- words to the effect "We don't have time or resources to get involved in any kind of panel tests."

Q. In response to any of your

requests for a demonstration of the widened and wandering instruments using the [3-5] 901 speakers, did they indicate a willingness to make such a demonstration?

A. No --

MR. BEIL: It's a leading question and has also been answered.

THE COURT: Ask him what was said?

Q. When you asked for the demonstrations of these phenomena which they claimed to have heard, what did they say?

A. They refused the demonstration. I don't remember the words.

THE COURT: Who did?

THE WITNESS: That was Mr. Florman.

THE COURT: What did he say? Do you remember the words?

THE WITNESS: No, I just said I don't, your Honor, remember the exact

words; but they said, "We can't do that," to the effect that "We won't do it." But the exact words he used there I don't recall.

THE COURT: How many times did you request this?

A. My recollection, your Honor, is twice. The timing of the one request is the one I just testified to. That one I remember. It was in the same context [3-6] that we just discussed. But I believe I asked for it at one other time during the day. The timing of that I don't recall. Also, when it was refused, I then asked, "Could I be given the records, the names of the records that you used to hear this phenomenon?" I requested that. I requested that of Mr. Seligson, and he promised me that he would arrange to get those names; and that never did take place.

* * *

[3-12] Q. Now, turning to another subject matter, I want to invite your attention to the time when you took the lunch break during that day and ask you to tell his Honor as best you can recall the discussions you had with the Consumers Union executives during the luncheon break.

A. Yes. As I testified yesterday, I had announced to them in arranging for the meeting that I wanted to make the visit for two reasons: One was to discuss the specific problems that I thought existed in the testing of loudspeakers, in particular the 901; and another was to make suggestions that I thought were appropriate to improve the quality of their magazine in general. Needless to say, when you have a session like --

Q. Well, I think you are getting a little off track. If I may, Doctor, just tell us what you said and what they said during the meeting.

A. Yes, all right. I brought up -- I used as an example the review that they had made on the Citroen automobile. And the minute I mentioned [3-13] the Citroen, Mr. Seligson and I believe Mr. Nagel, but certainly Mr. Seligson began making very complimentary statements about this car. And I believe it was he or possibly Nagel who had owned one and it had saved his life on a broadside collision because of safety factors built into the car. And they made some very complimentary statements about the automobile. And then I asked them, "Gentlemen, do you read your own publication because you took three pages to tear that machine apart." They said

-- well, those are the people who -- those are the people who write the automobile reports, that is not us. I then asked, "Do you feel an obligation to point out good things in products? For example, there is a phenomenal steering mechanism in that car which is a very big safety factor. Now, you didn't mention that. Did you feel that is a good thing to do? I think it is." And then I asked about the statement they made in that article which said that green blood oozed out all over. And I said, "Gentlemen, what happened? Did you have a brake leak?" And they said, "Yes." And then I said, "Look, can't you see that by making statements like that you [3-14] bias the reader not only against the product, but against the whole manufacturer. And don't you think your magazine would be more useful if you would just stick to

the facts?"

And at that point Mr. Florman, who was on my right side, said to me, "Dr. Bose, what do you think people read our magazine for?" I paused and I said, "Well, product knowledge, of course." And Walker Sandbach, who was on my left, pounded on the table and he said, "No, Dr. Bose, you are wrong. You are wrong, Dr. Bose. People read our magazine for entertainment."

THE COURT: Who said that?

THE WITNESS: Walker Sandbach, the executive director, who was on my left. And at this point Dr. Colston Warne said -- he hadn't said much, in fact, anything I guess during the whole meeting. He said, "Yes, yes, Dr. Bose, that is correct." He said, "We made a survey a couple of years ago and it showed that people really do read our magazine for

entertainment. It is not for product knowledge. They love to read about vermin hair in Campbell soup," which they had had an article on. And at this point Mr. Sandbach said, [3-15] "Dr. Bose, you are right. If we took out the sarcasm -- and he added the word spice -- "in our reports, it would be a more factual magazine." He said, "However, do you realize what would happen to circulation? It would drop to a quarter of its value."

Q. Who said that?

A. That was Mr. Sandbach.

THE COURT: How do you spell that name?

THE WITNESS: S-a-n-d-b-a-c-h, your Honor.

Q. Is that the substance of the discussion during the luncheon interval?

A. That is.

* * *

[3-27] Q. His Honor's question reminded me, did you at some point ask the defendant to publish corrective material in its magazine about your loudspeaker?

A. Yes, I did.

Q. When did you do that?

[3-28] A. I believe that was done in the response that Mr. Sandbach asked for at the end of the meeting, the response which I sent him within a week.

THE COURT: The first letter you wrote to him?

A. After the meeting, your Honor.

THE COURT: After the meeting?

THE COURT: That's correct.

Q. Did they ever at any time up to the present day, ever publish anything to correct or comment upon or explain what they had said about your 901 loudspeakers in the May 1970 issue of their magazine?

A. No.

* * *

[3-118]

CROSS EXAMINATION by Mr. Beil

* * *

You're, as you said, the owner and founder of the Bose Corporation?

A. Sixty per cent -- approximately 60 per cent owner and founder.

Q. Are shares of the corporation also owned by members of your family, your wife and children? A. Very small amount.

Q. In addition to the 60 per cent? A. About 1 per cent.

* * *

[5-49] Q. You testified earlier that you were adding dealers at this time. Did you ever lose a dealer because of what was published in the Consumer Reports article?

A. Not to my knowledge.

* * *

[5-118] Q. Did the Bose Corporation ever become first or second in the loudspeaker market in terms of either units or [5-119] dollars, depending on who is measuring what?

A. To the extent that I can believe the surveys, that is correct.

* * *

[5-122] THE WITNESS: Oh, I am sorry. The best of my present recollection is '78 or '79. I'm really not sure, within a year or so.

THE COURT: In dollar volume or in volume of sales units? Units or dollars?

THE WITNESS: Either one or the other. I am trying to remember what it said.

* * *

Redirect Examination by Mr. Perry

* * *

[5-125] Q. Defendant's Exhibit Z, which is in evidence, indicates that prior to May of 1970 your company had sold something over 9,000 pairs of Bose 901 speakers, as I recall. Let me ask you this: Has your company, to your knowledge, ever received a complaint from anybody who owned Bose 901 speakers other than the defendant in this case that the speakers caused instruments to appear to be of enlarged proportions or to wander about the room, ever have you received such a complaint from an owner?

[5-126] A. Never.

MR. BEIL: Objection, your Honor.

THE COURT: Well, strike out the answer to the extent that it was made. I didn't hear it. What is your objection?

MR. BEIL: Well, first of all, I think that it is going beyond the scope of cross-examination. Second of all --

THE COURT: I will overrule that objection.

MR. BEIL: Second of all, I think the witness is going to be read some statements about -- well, I will stand --

THE COURT: You are anticipating.

MR. BEIL: I stand overruled, your Honor.

THE COURT: The only objection you had was it was outside the scope of cross-examination?

MR. BEIL: That is correct, your Honor.

THE COURT: Overruled. Do you know the question?

THE WITNESS: Yes. I am sorry for answering early. The answer is no.

* * *

[6-111]

ARNOLD L. SELIGSON, Sworn

DIRECT EXAMINATION by Mr. Pollet

Q. Could you please state your name and occupation?

A. My name is Arnold Lawrence Seligson. And my occupation is that of electrical engineer, and I am presently the Chief of the Electronics Division at Consumers Union of the United States, Inc.

Q. Is that the defendant in this case? A. Yes.

Q. What is your business address, Mr. Seligson? A. My business address is at 256 Washington Street, Mt. Vernon, New York, 10550.

Q. And is that the principal headquarters of Consumers Union? A. Yes.

[6-112] Q. Would you give us your home

address, please? A. I reside at One Wendover Lane. That is spelled W-e-n-d-o-v-e-r, Suffern, spelled S-u-f-f-e-r-n, New York, 10190.

THE COURT: Where is that?

THE WITNESS: That is in Rockland County, New York, your Honor, approximately 35 miles northwest of New York City.

Q. How old are you, Mr. Seligson? A. I'm 49 years old.

Q. Are you a college graduate? A. Yes.

Q. Where did you attend college? A. I attended college at the City College in New York, that is now a division of the City University of New York.

Q. And is the City College commonly referred to as CCNY? A. Yes, it is so commonly referred to.

Q. Can you tell us the years that

you attended CCNY? A. Yes, I attended CCNY during the period from 1948 to 1952.

THE COURT: Did you get a degree or not?

THE WITNESS: Yes, your Honor.

THE COURT: What degree did you get?

[6-113] A. Bachelor of Electrical Engineering.

* * *

[6-114] Q. Mr. Seligson, have you continued your studies beyond the undergraduate level? A. Yes, I have.

Q. Can you tell us where you continued these studies and provide us with the time period, please?

A. Yes. I'm matriculated towards the degree of Master of Electrical Engineering at City College, and I attended City College during the period of time between 1953, roughly, and 1956.

Q. Did you receive a Masters Degree

from City College? A. No, I did not.

Q. Why did you not complete your studies for the Masters Degree?

A. Well, approximately during the latter part of 1956, I became engaged to be married and I found that since I was attending evening school, the demands on my time, based upon my new prospects of marriage as well [6-115] as the demands made upon me by my job, made it almost impossible for me to continue.

Q. Were you employed during this time period, during the mornings and afternoons? A. Yes, I was.

Q. Where were you employed? A. I was employed at the United States Naval Material Laboratory in Brooklyn, New York.

Q. Have you ever had any educational courses in the field of acoustics? A. Yes.

Q. When would that have been? A. That would have been approximately 1953.

Q. Do you recall the name of the educational institution?

A. Yes. The course was sponsored by the Brooklyn Polytech Institute in Brooklyn. I was a recruit of the Brooklyn Polytech Institute.

* * *

[6-116] Q. Following your graduation from CCNY, with a Bachelors Degree in Electronic Engineering in 1952, did you work as an engineer or as a scientist?

A. Yes.

Q. Can you tell us where you were so employed?

A. I was employed at the Naval Material Laboratory and my title at that Laboratory was that of Electronic Scientist with a specialty in electro acoustics.

Q. Is the Naval Material Laboratory maintained by the United States government?

A. Yes, it is. It is an arm of the Bureau of Ships of the Navy Department.

Q. And during what period of time were you employed at the Naval Material Laboratory?

A. Well, I was employed starting almost immediately upon my graduation from City College, and the employment lasted until the early part of 1956.

Q. Would you describe for the Court, please, Mr. Seligson, your duties and responsibilities as an electronic scientist at the United States Naval Material Lab?

A. Yes. My duties included such diverse functions as planning and executing tests upon a wide variety of electro acoustic equipment which was

employed by the [6-117] Navy on board ship and on shore installations. Such items as loudspeakers, microphones, intercom systems designed for on board ship; entertainment systems which were designed and intended for use on board ship for the benefit of the seamen. That included measurements and on the tape recorders, magnetic tape, and other such like devices.

Q. Did your work at the Naval Material Lab include evaluating or designing loudspeakers?

A. My work included largely -- largely consisted of evaluating loudspeakers; there was machine design work as well.

Q. Can you describe for the Court, please, the nature of your responsibilities in evaluating loudspeakers while you were at the United

States Naval Material Lab?

A. My responsibilities grew in scope indirectly in accordance with my employment. I started out as a Grade GS-5 and when I left, I was Grade GS-11, so that my responsibilities evolved as those positions changed. And they consisted in evaluating loudspeakers or such factors as the ability to reproduce sound properly, to meet certain specifications, with respect to durability and endurance. They involved making recommendations to the [6-118] Bureau of Ships for changes to be made in the loudspeakers or other items which we evaluated so that they would better meet the requirements of the Navy and of ship work use.

Q. Did you work on loudspeakers during this period -- strike that, please. Have you ever written any

articles on the subjects of electronics or home high fidelity equipment?

A. Yes.

Q. Can you describe these articles for us, please?

A. Yes, I wrote one article on a technical subject. Its title was the Free Field Techniques for Secondary Standard Calibration of Microphones. That article appeared in the journal of Audio Engineering Society. And I wrote a virtually monthly column for the New York Times. That column appeared sometimes every month, sometimes there was a gap of a month or two. The topic of that column dealt with home entertainment equipment, broadly defined as high fidelity equipment. And the column appeared in the Sunday entertainment section of the New York Times.

* * *

[6-151] Q. Mr. Seligson, during the course of your employment at Consumers Union, and prior to 1969, had you had any experience in testing, evaluating and measuring loudspeakers? A. Yes.

Q. Can you please describe for us what that experience was?

[6-152] A. There was experience which I had while working for the Navy, which I have already described. In addition, starting in 1958, Consumers Union performed a number of tests on loudspeakers, approximately four or five projects in the testing of loudspeakers. And during which time I believe we had tested as many as one hundred or more loudspeakers.

Q. And subsequent to May, 1970, from that point on to the present date, have you continued to have any experience at Consumers Union in the testing and

evaluation of loudspeakers?

A. Yes. Subsequent to that period of time, we performed perhaps half a dozen or so projects on loudspeakers, testing at least as many loudspeakers in that period of time as in the years prior to 1979 -- pardon me, to 1969.

Q. Can you tell us approximately how many articles were published in Consumers Reports, based upon tests conducted or supervised by you?

THE COURT: In what field?

MR. POLLET: In the field of loudspeakers, your Honor.

THE COURT: All right.

A. I would estimate -- I haven't taken a precise count. [6-153] I won't stipulate it would be a dozen or so or close to a dozen projects.

Q. Mr. Seligson, did you have any duties and responsibilities with respect

to the conducting or supervising tests and measurements and evaluations of loudspeakers in connection with the loudspeaker article appearing in the May, 1970 issue of Consumers Reports?

A. Yes.

Q. Can you describe for us, please, what those duties and responsibilities were?

A. Yes, as a senior project engineer at that time, it was my duty to plan the overall project. To plan the tests that were to be performed, to supervise others in the performance of those tests, and to perform some of the tests myself, to analyse the results which were yielded by the tests and to prepare or supervise the preparation of our report to the Editorial Department.

Q. I believe you testified that your duties included supervising other persons

who were -- had some role in the tests and evaluation of loudspeakers leading up to the May, 1970 article, is that correct?

A. Yes.

Q. Can you identify those people for us, please?

A. Yes. One of them was a Mr. Alan Lefkow. Another [6-154] individual was Mr. Lawrence Gianguzzi, I'll try to spell that for you: G-i-a-n-g-u-z-z-i. Another individual who participated on occasion was a Mr. Eric Maneskjold.

Q. What was Mr. Lefkow's title or position at Consumers Union during this time?

A. Mr. Lefkow at that time was a project engineer.

Q. And can you tell us in a general fashion what Mr. Lefkow's duties and responsibilities were with respect to the

Consumer Reports, May 1970 loudspeaker?

A. They were general engineering functions. He was expected to set up equipment, to perform tests, to be able to see to it that they were properly -- that the equipment was properly calibrated, functioning properly, that the tests were being properly done. He made measurements on the loudspeakers and he assisted in the preparation and analysis of the reports.

* * *

[7-21] Q. I believe that the last type of listening test which you referred to was demonstrated as special listening tests. Can you describe this test and give us the purposes of these tests?

A. To further evaluate the special sound characteristics which were claimed for some of the loudspeakers in the project. We set them up in the listening

room and two persons, myself and Mr. Alan Lefkow, listened for an extended period of time, using a number of records, to the three loudspeakers to see what we could hear in the natural course of listening, to see if we could discern what it was the loudspeakers [7-22] were intended to produce in the listening room.

Q. Mr. Seligson, you have described three listening tests with three separate sets of panelists. Why were three sets of panelists chosen?

A. Well, the panel of five was a strict requirement due to the eventual statistical analysis of results. And the panel of two for the cricket tests were simply two observers who were readily available at the time. It was only necessary that they possess the normal human faculties of being able to point to

the direction from which a sound comes. And finally, for the special test, I felt that this would require a subjective evaluation. I thought that the appropriate parties to do this were these very engineers who would be required to describe what they heard in writing.

* * *

[7-23] Q. And why were the panelists selected for the special listening tests?

A. The special listening test panelists, myself and Mr. Lefkow, were engineers with experience and a knowledge of acoustics and electronics; and we felt that they would be the appropriate parties to make those subjective judgments that were called upon by this test.

* * *

[7-96] Q. Turning back to the page [of PX9] headed "Personal Observations on

Bose 901," please, can you tell us where these tests, the special listening tests that you and Mr. Lefkow conducted, took place?

A. Yes, they took place in the Consumers Union's listening room.

Q. And do you recall how long the test took place?

A. The test took place for several hours. I cannot put an exact figure on it. It was at least two hours.

Q. Can you describe for us, please, how the test was conducted?

A. The test was conducted as an A-B test. Mr. Lefkow and myself were in the room listening [7-97] to the Bose 901 loudspeakers. We were able to switch back and forth to a reference loudspeaker, which was an ADC 301, I believe, and we played various records on a turntable and listened to the music as it sounded forth. As we listened to the

music, we noted whatever effects we heard; and we walked around the room, did quite a bit of listening, and then recorded the data in this notebook.

Q. Was the date that you did this test recorded in this notebook? A. Yes, it was.

* * *

[7-99] MR. POLLET: Perhaps the witness should read the whole portion that is in his hand, your Honor, so that it will be clear because it is in his handwriting, and it's not all that legible.

THE COURT: All right.

THE WITNESS: All right. It says: "Appears to have exaggerated mid bass, not particularly objectionable, but noticeable. Piano music is unusually spread. Piano is wall to wall. Violin is also widened (Menhuin-Shankar) and appreciable moves across room."

THE COURT: And appreciable what?

THE WITNESS: I believe that was meant to be appreciably. "Violin not as wide as piano. Seems effect is strongest on 'centered' sound. Try mono records." Beneath that is written: "Eureka!"

THE COURT: What did you find --

THE WITNESS: That which follows: "Mono is 'vastened' - all space noted for stereo, also noted for mono. Broadening effects also noted."

THE COURT: I don't understand the explanation, "seems effect strongest on centered sound." I don't see the pertinence of it.

[7-101] THE WITNESS: Ordinarily, I would have expected to find that mono records would have produced a tightly centered sound in the listening room, right between the two speakers. What I found, instead, was a wall of sound

across the room much like stereo records, and I was surprised at this; sufficiently to write down the word "Eureka," your Honor.

THE COURT: All right.

Q. When did you write the data? Was it while you were listening to the records or afterwards?

A. No, it is a summary written immediately after listening.

Q. Did you and Mr. Lefkow write your comments at the same time?

A. No, we wrote them one after the other.

Q. How long after you had completed your listening to the Bose 901?

A. Well, I couldn't say with certainty. It was certainly within minutes.

Q. Were any other speakers included in this test on this occasion?

A. We listened for a short period of time to the Harmon-Kardin KH 50s in a similar circumstance, [7-102] but we noted nothing particularly unusual about it and we stopped listening very quickly. The other loudspeaker that was listened to was the reference loudspeaker, which was there for a reference effect so we could see what ordinary loudspeakers that have their loudspeakers mounted on the front panel facing the room would sound like under the same circumstances.

Q. And was this test and the comments recorded the basis for the portion in the Consumer Reports loudspeaker article which referred to, "Individual instruments heard through the Bose system seem to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be ten feet wide, and a piano

stretched from wall to wall." Is that correct?

A. Yes.

Q. The Consumer Reports article goes on to say: "With orchestral music, such effects seemed inconsequential, but we think they might become annoying if listening to soloists." Can you give us the basis for those [7-103] last two sentences with respect to orchestral music and soloists?

A. Orchestral music is ordinarily expected to occupy a wide sound stage with a substantial spread of sound from one end to the other. Whether or not we listen to a conventional stereo system or not, that is indeed the effect when one hears a stereo record with the orchestra distributed across a wall; and that is the way we ordinarily expect to listen to music of this type. The Bose 901 still

yields the full wall effect; and indeed, it is quite possible that actually listening to such music in a concert hall, similar effects would be noted. That is possible. But when listening to soloists, one expects to hear the sound emanating from a fairly local source. His violinist should occupy a limited space in a room, and a piano should not be so large that it seems to stretch from one end of the front wall to the other end. That conflicts between what one hears in the case of a soloist and one expects to hear -- one actually knows a violin is a small instrument [7-104] and yet hears it as coming from a large area, that conflict could lead to some distress. That is the reason for the statement that they might become annoying when listening to soloists.

* * *

[7-107] Q. Mr. Seligson, I believe you will recall that Dr. Bose, during his testimony in this case, stated that it was his belief and opinion that it was scientifically impossible for anybody to hear instruments through the 901 seem to grow to gigantic proportions or tend to wander. Do you recall that testimony?

A. Yes, I do.

Q. Do you agree with that testimony?

A. No, I do not.

Q. Do you have an opinion as to whether there are scientific principles which explain the phenomenon of appearing to hear enlarged or wandering instruments which you experienced in listening to the Bose 901?

A. Yes, I believe there are a number of scientific theories which might singly or in combination account for the possibility that instruments will grow to

large proportions and wander.

Q. Could you state the basis of your opinion, please? A. Yes, if I may go to the sheet, another sheet of paper.

Q. Sure, do you want a clean sheet or do you --

A. A clean sheet of paper, I think, perhaps -- [7-108] thank you. Your Honor may recall when Dr. Bose testified sometime ago he started --

THE COURT: Excuse me. Have you taken precautions so there will be no possibility of mistaking this drawing with the drawings already --

MR. POLLET: We can separately number that sheet, your Honor.

THE COURT: Why don't you do it now?

MR. POLLET: Surely. I guess perhaps we should use a letter. I think Dr. Bose used numbers. We will mark this as A in the upper right-hand corner.

THE COURT: Dr. Bose used numbers only and no letters?

MR. PERRY: The sheets were numbered 1 through 13. They have been stapled together and marked as Plaintiff's Exhibit 21, your Honor.

THE COURT: All right.

THE WITNESS: Perhaps your Honor remembers when Dr. Bose testified, he at one point drew a violin in free space out in an open field and showed the sound rays from the violin spreading in various directions. [7-109] He indicated a listener placed some distance away and said under those circumstances the listener would -- testified substantially under such circumstances the listener would never perceive the violin to be very wide. I forget the distance he used. Then he supplemented that statement and that drawing with another

one in which he placed a band shell behind the violin. We represent this by this little dot. Call that the violin, and let's call this a reflecting band shell behind the violin and put a listener somewhere out here, a pair of ears; and the sound waves from the violin strike the band shell and are reflected forward toward the listener and also a direct ray is directed toward the listener. Under these cirumstances, Dr. Bose stated that the sound image was the width of the stage, but that the listener would not be able to perceive a violin itself as being the width of the entire stage.

THE COURT: Would not?

THE WITNESS: Would not. That was Dr. Bose' testimony. This is based on a well-known [7-110] principle. It's a principle that's about perhaps 140 years

old, discovered by a famous scientist by the name of Joseph Henry; and it is known by various names. I'd like to call it by one of the names by which it's known, which is the fusion effect, f-u-s-i-o-n; and it predicts that if one of the rays of the sound reaches the listener ahead --

THE COURT: You don't mean a ray, do you?

THE WITNESS: Ray, r-a-y.

THE COURT: I've never heard sound referred to as a ray.

THE WITNESS: We call them rays for convenience. Notice the way the drawing is made. We can plot the course taken by the sound waves by means of straight lines emanating from the violin, bounding off reflectors, reaching a listener; and for purposes of convenience, we can refer to these lines as rays. The fusion

principle states that if one such ray reaches the listener ahead of the others, the listener's perception, his illusion, will be that all the sound will seem to originate at the point from which the earliest ray arrives; [7-111] in this case, the violin. The direct ray reaches the listener first because all the other rays have been diverted to reach the reflector and then to the listener, and they will take slightly longer to reach the listener than the first ray. The listener, under these circumstances, perceives all the sound coming from the violin, all loudness only, by the reflections from the reflector. But now, if your Honor would imagine, we put the violin behind a screen of some kind, sort of a dressing screen. That obscures the violin from the view of the listener. So this direct ray is severely weakened on

its way to the listener.

This fusion theory, which is promulgated by a -- which was very clearly explained by a scientist by the name of Helmut Haas, will predict that, under those circumstances, when the direct rays sufficiently weaken, the listener will cease to hear the sound originated from the violin, and he will direct his attention to the next earliest arriving ray or rays; in this case, perhaps several rays will reach him so close together that, under those circumstances, his [7-112] perception of the image shifts away from the violin and back to the reflector. The perception of that violin will broaden.

This is not merely a sound source broadening in the manner in which Dr. Bose described, but this will be really apparent widening of the sound. It will

seem to emanate from many, many points in space behind the violinist. To the extent which this occurs is predicted by Dr. Haas; and he states that, if the sound of the first arriving ray is weaker by a factor of 10, approximately, that there is a variance here -- by approximately 10 -- then the sound of the next arriving ray, the fusion principle, which is responsible for the localization of sound, will begin to fail. And the listener will begin to hear sound emanating from a vaguer and vaguer and vaguer source.

This is one principle which could account for the widening of a sound which I perceived when I listened in CU's listening room. There are other scientific theories which can also account for this, perhaps taken together. One of them is known as backwards

inhibition. That is another fancy name, and it [7-113] is a theory which was promulgated by the Nobel laureate, Dr. George von Bekesy, who is perhaps one of the most brilliant innovators in the field of psychoacoustics and, indeed, upon his theories are based some of the most well-recognized theories of hearing. He discovered an interesting fact, or at least he mentioned this fact. I don't know if he was the original discoverer of this.

If we listen and we hear a distinct sound, and I will represent this by a little chart which will indicate what happens in the course of time, a graph, if you will, your Honor, of occurrences as a function of time. If at some moment in time we hear an impulse of noise, perhaps a short swishing sound, and then some few moments later, actually 30

thousandths of a second to one tenth of a second later, we provide another such swish of sound, there is something which operates in the psychophysical hearing system that will actually suppress the very first sound, weaken it, sometimes to the point where it cannot be heard at all. If such delays are present, and they are present in most rooms because reflections, after all, take longer to reach the ear than the [7-114] original sound, and if those reflections occur in the proper time frame, then it is possible for them to suppress that first sound, the first sound of the instrument. The Bose loudspeaker is somewhat similar to this. I will draw it right over the violin, if I may.

Q. (by Mr. Pollet) Mr. Seligson, perhaps it would be more convenient for you to use another page?

A. All right. I'll be happy to do it. Is it all right if I label it myself B?

Q. Yes. If you will just write the letter B in the upper right-hand corner and circle that so it will be separately identifiable.

A. If I'm correct in my exposition of the scientific theories, and I believe they are, when a Bose loudspeaker is placed in an ordinary listening room and placed in the following fashion, indicating this roughly -- your Honor will remember a pentagonal shaped loudspeaker with eight drivers facing rear and one toward the front, the principle which must operate for the listener to fuse the images to perceive them as properly located in space, not widened, not wandering, is that the sound from the front facing [7-115] loudspeaker

arrives at his ears a little ahead of the sound from the rearward facing loudspeakers. Perhaps I'm not drawing this quite correctly. They pass through the room by reflection; but not only arrive earlier by virtue of the fact that it protrudes further into the room, but it must arrive with sufficient strength at the listener's ear for him to be able to achieve the fusion. If Helmut Haas' principle is to be adopted, the strength of the sound reaching his ear must be at least one tenth of the strength --

THE COURT: You say the fusion will take place in the ear?

THE WITNESS: The fusion is a psychological effect, your Honor, which takes place in the ear. It's apart from the physical acoustics.

THE COURT: Just like rapidly successive light?

THE WITNESS: Exactly.

THE COURT: You see it as a continuous light, but it's really --

THE WITNESS: Exactly, your Honor, which is the principle, perhaps of the motion picture. We see successive frames; we perceive [7-116] them as a continuous effect. There are similar illusory characteristics which operate in the hearing principle as well. I think we mentioned ventriloquy, where it's possible to be fooled into thinking the dummy speaks. The mind is truly an astonishing thing, and we should not be terribly surprised that we can be amazed at its functioning.

In the case of Bose, we must maintain the adequate strength of signal to his ear from the front loudspeaker to minimize the possibility -- the fusion principle will not function. The

backward inhibition effect may also arise, possibly because some of the rays, as they reflect through the room, may reach the listener with sufficient strength to partially dim the initial sound from the front facing loudspeaker. This is a second effect which is added on to the first. Now, there are other explanations which other scientists have offered. There is a scientist who works for Bell Telephone Laboratories by the name of Gardener who has written a number of papers which are concerned with image localization, broadening, and, indeed, [7-117] wandering; and he has shown, as other workers have shown, that it is possible to move an image back and forth across a wall, let's say, beyond the sources of sound from which they originate simply by means of varying the times by which they are propagated and

their amplitudes. It is a well-known effect, and it has been utilized commercially to prepare -- if I use the word phony, quote, unquote -- stereo records from monophonic sources. There are ways to doctor a simple record, monophonic record, and make it sound as if it were coming from a broad area. Some of these effects he enumerates in his papers. One of the reasons this may occur, he hypothesizes, in the course of the sounds' travels to our ears, the sound may undergo changes in its response characteristics, in its loudness versus frequency characteristics, due to the fact that furnishings in the room or different wall treatments may select, absorb, and reflect sound; so by the time the sound reaches our ears, the sound from a pair of loudspeakers is somewhat different. The left loudspeaker may

produce a [7-118] somewhat different spectrum of sound at the ears than the other loudspeaker. For example, it might look like this. This would be loudspeaker No. 1, and this would be loudspeaker No. 2's sound loudness as it reaches the ear is a function of frequency when this occurs, this phenomenon occurs. Then too, it is a well-known fact, extremely well-known fact, that image broadening displacement effects can occur. Gardner points that out in his paper.

Finally, there's still another scientific principle at work, which has been espoused by a person by the name of Queen, who has espoused a theory that says that image broadening and widening will occur if the rays of sound reaching the ear from a loudspeaker which result from the sideways dispersion of energy --

in other words, your Honor, you may recall that we talked about a polar response curve. The sound does not reach the ear of a listener from a loudspeaker in a single ray, but is likely to have a rather ragged look; and that this hyperpolar response will change with different frequencies. Queen has postulated and has performed calculations which are reasonably convincing which [7-119] shows that, if this effect occurs, the listener will perceive a broadened sound image.

In the case of the Bose speakers, we have performed polar measurements and have data to show that the sound which is thrown into the room from behind will vary this way with frequency; and, therefore, it would not be terribly surprising to me to find that broadening effects will occur. In what proportions

these effects will operate in the Bose loudspeaker and in what combination, it is nevertheless clear that such effects are recognized in the literature and they are documented.

THE COURT: Are you saying that the lateral, what appeared to you as the lateral movements of the instruments were caused by this --

THE WITNESS: Were caused by -- I've enumerated four possible mechanisms by which this could occur.

THE COURT: Does that explain, in your opinion, the lateral movement of the instrument?

THE WITNESS: Yes.

THE COURT: I think your statement in the article which says they moved into the room, just as if they came forward, as well --

THE WITNESS: The example given for

the [7-120] movement into the room refers only to a widened violin and a widened piano and was meant to imply only that the widening and movement was across the rear wall from the two speakers.

THE COURT: May I see that article? What page?

MR. POLLET: 274, your Honor, in the right-hand column toward the bottom.

THE COURT: In the right-hand column, did you say?

MR. POLLET: I believe so, although at this point I'm not sure I know my right from my left.

THE COURT: "It tended to wander about the room." It didn't say from side to side or against the walls alone, but it says --

THE WITNESS: I believe the next sentence is meant to explain that. It then says, "For instance," as an example

of the effect. In that instance cited, I believe, it is quite clear that it means that a violin was ten feet wide -- we are talking about the width and stretching from wall to wall.

THE COURT: The word "about" means around, [7-121] doesn't it?

THE WITNESS: It was, your Honor, it was meant to mean about the rear wall, between the speakers.

THE COURT: That isn't what it says, though.

THE WITNESS: I understand.

THE COURT: All right. Go ahead. Just a moment, does Consumers Union still have the 901s with which you made your observations?

THE WITNESS: Yes, your Honor.

THE COURT: So that the same phenomenon you stated you observed when you conducted these tests would be

repeated in a demonstration today?

THE WITNESS: Your Honor, I believe that your Honor requested such a demonstration, and I believe counsel --

THE COURT: Would it still --

THE WITNESS: Would it still occur? Yes, there is no reason to expect that it would change due to the change of the calendar years or the evolution of time.

Q. Mr. Seligson, subsequent to the completion of the tests and measurements on the loudspeakers which [7-122] you have discussed, what was the next step taken in the preparation for the article which ultimately appeared in the May 1970 issue?

A. The next step was to prepare a written report which documented our findings. That report was to serve as a document to be sent to our editorial department to assist them in preparing

the manuscript for publication.

Q. Did there come a time when you prepared a draft of such a report?

A. Yes.

* * *

[7-123] Q. Looking at Plaintiff's Exhibit 10, Mr. Seligson, can you identify that for us, please?

A. Yes, this appears to be the rough draft of the manuscript which we prepared and which we ordinarily refer to as reports to editorial.

Q. Can you tell us who prepared this rough draft?

A. Do you mean who originated it? It was dictated in part by me, written in part by Mr.Lefkow, and was typed up by a secretary.

* * *

[7-127] Q. Yes. If you turn to Page 27, please. I believe you stated that

that portion from Page 27 through 34 was dictated by you, is that correct?

A. Yes. One moment. To 34, you say?

Q. Yes. A. Let me check. Yes.

Q. Do you recall when that portion was dictated by you? A. No. It would have been middle to end of January, but I'm not quite certain of the date.

Q. What year, please? [7-128] A. 1970.

Q. And does the material found in Pages 27 through 34 refer to the Bose loudspeaker?

A. Yes, I believe it does, but -- yes, there are references to the Bose loudspeaker.

Q. And are there references in these pages to the special listening tests conducted by you and Mr. Lefkow?

A. I would like to read that.

(Pause.)

A. (Continuing.) I see a reference to the cricket test, and I see references to the third or special listening test.

Q. Can you identify where in the document there are references to the third listening test, the special listening test?

A. Yes, that would be beginning on Page 29.

Q. Can you set forth where in the page that material is found?

A. That special test description begins right at the top of the page where it says, "A second experiment was conducted. We repeated the A-B-C listening experiment, this time using as program material a wide variety of stereo records."

[7-129] Q. And does that continue in reference to the special listening test?

A. Yes, it does. Yes. Going down to the middle here, on Page 30, it still continues to discuss that matter. I would say it continues until the insert on my copy, in red ink, at the very top of Page 30.

* * *

[8-5] Q. Can you tell us what the next step in the process leading to the Consumer Reports article on loudspeakers was, following the dictation of the draft to Editorial?

A. Yes, I reviewed it, dictated the copy and made such changes or recommendations or deletions as I felt were appropriate and then submitted the report to my superior for review.

Q. And who would that be? A. That was Mr. Carl Nagel.

Q. Did anybody else other than Mr. Nagel review the draft to -- the report

to Editorial? A. Yes. I believe Mr. Monte Florman, Mr. Nagel's supervisor reviewed it.

Q. And following the review of Mr. Florman and Mr. Nagel, what happened? [8-6] A. Following their review, the report was retyped with all of the appropriate modifications.

THE COURT: Is it necessary to go over the process of drafting and redrafting of it? Of what consequence is that? What is the relevance, please?

MR. POLLET: Your Honor, the process by which the test ends up becoming an article is a great deal of importance.

THE COURT: By what reason?

MR. POLLET: That there was care and reasonable steps taken in putting the test reports into a finished article.

THE COURT: But not the printing process.

MR. POLLET: We were not talking about the printing process.

THE COURT: It's part of the production of a publication itself. It has nothing to do with the merits. He said, no changes were made. Why take up the Court's time.

MR. POLLET: Your Honor, I will.

THE COURT: Don't argue with me. Just watch the relevancy of your questions.

MR. POLLET: I would like to put into evidence the final version of the report to Editorial.

[8-7] THE COURT: Wasn't the final version actually published and is identical with the reasons of this action? Isn't it?

MR. POLLET: It is not necessarily word-for-word identical, your Honor, but the process by which the tests and the

evaluations become --

THE COURT: Perhaps it will take less time to have you aware, but go ahead. Unless it takes an inordinate amount of time, I wish you had been more effective and more efficient.

MR. POLLET: I don't believe it will take more than five minutes.

THE COURT: Go ahead.

Q. Mr. Seligson, I show you a document which has been marked for identification as Defendant's Exhibit A-N. Can you tell us what that is, please?

A. That is the final copy of the report for Editorial.

Q. And did you --

THE COURT: What did you say it was marked?

MR. POLLET: A-N.

Q. Did you play a role in preparing

that document? A. Yes.

Q. And does a date appear on that document? A. Yes.

[8-8] Q. What is that date, please?

A. February 4, 1970.

MR. POLLET: Your Honor, at this point I'd like to move to introduce into evidence Defendant's Exhibit A-N, the final version of the report to Editorial.

THE COURT: Is that one and the same document?

MR. POLLET: Yes, your Honor.

MR. PERRY: I have no objection.

THE COURT: Admitted.

(Defendant's Exhibit A-N, Final Editorial Report, entered in evidence.)

Q. Mr. Seligson, what is the relationship between the report to Editorial and the final published article in May, 1970?

A. The report to Editorial serves as

the guide for our Editorial Department in preparing the manuscript which was published in the magazine.

Q. And is the report to Editorial distributed outside the technical department?

A. Yes, it is.

Q. Where is that distributed?

A. It is distributed to various departments that may wish to review it. The executive directors, the technical directors, the Editorial Department, of course, the [8-9] market division, our library and several other departments I cannot offhand recall.

Q. What is the next step in the publication leading to the article after a submission of the report to Editorial to the Editorial Department?

A. A writer of the Editorial Department prepares a manuscript.

Q. Was that done in this case?

A. Yes.

Q. And after the manuscript is drafted by a writer in the Editorial Department, what happens next?

A. It is submitted to the technical department for review.

Q. Mr. Seligson, I show you a document which has been identified as Defendant's Exhibit A-O and I ask you if you can please identify that document, please?

A. This appears to be it.

THE COURT: No, tell us what it is?

A. This is the Editorial Department manuscript which was submitted to the technical department for review.

Q. And is there handwriting on that document? A. Yes.

Q. And can you identify the handwriting? A. Most of the handwriting

on the document appears to be mine. There are a few notations in another [8-10] handwriting. I'm not certain whose.

MR. POLLET: Your Honor, at this point, I would like to move to introduce into evidence Defendant's Exhibit A-O.

MR. PERRY: No objection.

THE COURT: Admitted.

(Defendant's Exhibit A-O Editorial Department Manuscript, entered in evidence.)

Q. Did you review the Editorial manuscript after receiving it from the Editorial Department? A. Yes.

Q. Does anybody else review the Editorial manuscript after --

A. Yes. Mr. Nagel and Mr. Florman, to my knowledge.

Q. Can you tell us what the next steps are, please, in the publication of the article ultimately appearing in the

May, 1970 issue of Consumer Reports?

A. After that manuscript is reviewed, the manuscript is set into type and various editorial revisions occur until it finally appears in the magazine in its final form.

Q. Can you tell us who in Consumers Union reviews the editorial manuscript prior to publication?

A. Well, among the members -- there are the members of the technical department I mentioned earlier, myself, [8-11] Mr. Nagel, Mr. Florman, and possibly Mr. Kaplan at the time. And then there are individuals in our library division, marketing division, and members of the editorial staff itself, the editors.

* * *

[8-61] Q. Going back in time, Mr. Seligson, and putting yourself in the

time period between September 1969 and May, 1970, can you tell us what your attitude and feelings were toward the Bose Corporation and its products during that time period?

A. I had no special feelings toward them, neither animus nor especially favorable of them. I regarded them as I would regard any other manufacturer of loudspeakers.

* * *

[9-2]

Cross Examination by Mr. Perry

* * *

[9-70] **Q. At the time of the June 3, 1970, meeting, at Consumers Union, where were the Bose 901 speakers that Consumers Union had tested as part of the loudspeaker evaluation project which commenced in 1969?**

A. You mean physically?

[9-71] Q. Yes.

A. They were in the electronics laboratory.

Q. At Consumers Union? A. Yes.

Q. Were you present during the meeting when Dr. Bose asked for a demonstration of those loudspeakers? A. Yes.

Q. You recall that he did ask for a demonstration? A. Yes.

Q. Was a demonstration made? A. No demonstration was made, Mr. Perry.

* * *

[9-73] Q. How long would it have taken to set up the demonstration? A. Oh, about half an hour, I suppose.

Q. Did Consumers Union have whatever equipment was necessary to make the demonstration readily at hand? A. Yes.

* * *

[9-74] Q. Let me ask you this: As of

this moment, do you have any plans to make a demonstration of those same 901 speakers for the Court?

A. There are some plans, yes.

Q. You plan to do it? A. I understand his Honor requested it. I certainly would never contradict his Honor's request.

Q. All right. Now, in 1969 and 1970, Alan Lefkow was an engineer at Consumers Union, right? A. Yes.

Q. What was his title then? A. Project engineer.

Q. Did he work under your supervision and direction on the loudspeaker evaluation project which began in 1969? A. Yes, he did.

Q. Were you his immediate superior at that time? A. Yes.

Q. You were his boss, so to speak? [9-75] A. Yeah.

Q. And from time to time, did you make evaluations of his work and report them to people higher in management?

A. In an informal way, Mr. Perry.

Q. Were you in a position to influence his compensation? A. No, Mr. Perry.

Q. Amount of pay? A. No.

Q. If you gave him a good recommendation, wouldn't that help him get a raise?

A. I don't think so, Mr. Perry. The Consumers Union plant was then unionized, and I don't think merit increases were given out.

Q. Were you in a position to have a negative impact on his career at Consumers Union if you wanted to?

A. Yes, I believe so.

Q. Is he still employed at Consumers Union? A. Yes, he is, Mr. Perry.

Q. What capacity? A. He is a senior project engineer.

* * *

[9-88] Q. Who were the panelists for the cricket test?

A. Their names were Hal Shair, and the second panelist on the cricket test was Mr. Joseph Selserman.

Q. When the article published in May, 1970, referred to a panel for the cricket test, did you mean to refer to only those two men?

A. Yes, Mr. Perry.

Q. To you, two is enough for a panel? A. Yes, Mr. Perry, I believe that a panel may be defined as more than one.

Q. Would you agree that the use of the term "panel" [9-89] to describe two listeners is at least misleading?

A. Well, I don't know to whom it

might be misleading. I'm not certain whether I can say anything about that. It seemed to me at the time that panel would be adequately describing two people.

Q. I had in mind that it might be misleading to people who read the magazine. Wouldn't you agree that the use of the term "panel" to describe two people would tend to mislead readers of the magazine?

A. Well, our readership is mostly laymen. They are not audiophiles, and they are not professionals, by and large; and I'm not certain whether it would or wouldn't mislead them. I cannot put myself in their frame of mind, necessarily.

Q. Well, as far as you are concerned, wouldn't you agree that the use of the term "panel" to describe two

people may be very misleading or at least may be misleading?

A. I don't think it would be very misleading. If it's misleading at all, then it could be possibly a mite misleading under certain conditions. I don't know.

* * *

[9-99] Q. All right. Now, I want to turn your attention, Mr. Seligson, to a portion of the article which was published by the defendant in the May 1970 issue of Consumer Reports. Now, Plaintiff's Exhibit 7 -- and I think there is a copy in front of you, isn't there?

A. Yes.

Q. And I want to invite your attention to that part which says, "Some loudspeakers of special interest," beginning on page 274. Does your Honor

have a copy of the article?

THE COURT: Do I have it?

MR. PERRY: Here is Exhibit 2, which is identical.

Q. At Page 274 and 275 appears some material relating to Bose 901 speaker. Did you prepare the draft report to editorial along with Mr.Lefkow which was the basis of that portion of the article?

A. Yes, Mr. Perry.

Q. And after editorial revised your draft and prepared a first draft of the article, did you check that work for accuracy?

[9-100] A. Yes, I checked the first draft of the editorial copy.

Q. After it was set in type, did you see the galleys? A. Yes, Mr. Perry.

Q. Did you check the typed galleys for accuracy? A. Yes, Mr. Perry.

Q. Would it be fair to say that you

approved the final text of the article as it was published, at least so far as it relates to the Bose 901?

A. Well, Mr. Perry, I did not have the authority to approve. I simply was able, by my position, to offer corrections or recommendations for changes. But the right of approval was not mine.

Q. Did you suggest any changes in what you saw, that is the galleys of the article?

A. I don't recall what I might have suggested to the galleys, at the galley stage.

Q. Do you recall suggesting any changes in the article which were not made?

A. No, I simply don't recall the entire process. There may very well have been changes which I suggested which were

not made.

Q. At least if there was anything that you consider technically inaccurate, you could have objected to it?

[9-101] A. Yes.

Q. Is there any portion of the material there about the Bose 901 which you now believe to be inaccurate?

A. No, Mr. Perry.

Q. Or misleading? A. Or misleading.

* * *

[9-128] Q. Now, I want to turn, sir, to another portion of the article, Plaintiff's Exhibit 7. I'll read it to you.

> **"Worse, individual instruments heard through the Bose system seemed to grown to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be ten feet wide, and a piano stretched from wall to wall."**

A. One moment, Mr. Perry. I seem to have misplaced --

Q. Page 275 in the right-hand column, the last paragraph.

* * *

[9-130] Q. What were the musical instruments which wandered about the room during that test?

A. I believe we said they tended to wander about the room.

Q. All right. What were --

[9-131] A. And the same two instruments would -- no, I take that back. The instruments which I recall as tending to wander about the room was the violin.

Q. Not the piano? A. No, I don't recall it wandering about the room.

THE COURT: I think the piano is stretched across.

THE WITNESS: It stretched across the room, yes, your Honor.

Q. And were you in the listening room at Consumers Union when you heard these phenomena? A. Yes.

Q. Do you recall the dimensions of that room? A. Approximately.

Q. What were they? A. The room was about 28 feet long by about 18 feet wide by about eight and a half feet tall.

Q. In Answers to Interrogatories earlier in this case, the defendant gave the dimensions of the listening room. I refer to Interrogatory 41-K, as 18 feet, 9 inches by 24 feet.

A. Oh, 24. Right.

Q. Does that sound about right?

A. It sounds about right.

Q. All right. I'm going to ask you to step down to the [9-132] easel, if I may, your Honor, and draw us a sketch of the listening room and where the loudspeakers were located when you heard

these gigantic wandering instruments. And then I'm going to ask you to draw some other things in, so make it a nice big sketch, if you would. It needn't be precisely the scale, but roughly so.

(Witness complies.)

A. This is approximately the room.

Q. Now, could you draw in the loudspeakers in their location?

(Witness complies.)

A. Pardon me for the --

MR. POLLET: Excuse me, Mr. Perry. Could you move to the side?

MR. PERRY: Yes.

Q. How long did you listen to the Bose 901 on this occasion? A. For several hours, Mr. Perry.

Q. Did you and Mr. Lefkow remain seated in one place throughout those several hours?

A. Not for the entire period, Mr.

Perry. We did get up. It was difficult to sit in one place for several hours.

THE COURT: What kind of recording did [9-133] you use?

THE WITNESS: We used a large variety of recordings, your Honor, from our supply. We have a closet full of recordings which have been accumulated over the years.

THE COURT: Did you select any particular pieces of music?

THE WITNESS: With the exception of one piece, which I recall definitely, there was random selections from classical to some popular music.

THE COURT: Do they include vocal --

THE WITNESS: Yes, your Honor.

THE COURT: -- as well as instrumental?

THE WITNESS: Yes.

Q. Were there some chairs there,

where you and Mr. Lefkow were seated part of the time? A. Yes.

Q. Could you draw in the appropriate location of the chairs?

(Witness complies.)

A. Again, that is my best recollection, I would say, somewhere like that.

Q. For the record, you have drawn two U-shaped objects approximately in the center of the room.

A. Sort of hooking down like an armchair.

[9-134] Q. Very good. And from time to time, while you were listening, did Mr. Lefkow get up and wander about the room?

THE COURT: No, the instruments.

Q. First, I want to know about Mr. Lefkow.

A. I'm not certain, Mr. Perry. I know he must have gotten up. But it was

very difficult to sit in a chair all this time. But I cannot be certain, you know, how he wandered or what he did.

Q. Well, during this listening test, did you get up and wander about the room at all?

A. I believe I got up once or twice and walked around, yes.

Q. And would that be fairly characterized as wandering about the room?

A. I would say that you could say I wandered about the room. Yes.

Q. All right. Perhaps you would take the orange marker, if you would, and show on the chart where you wandered about the room during this test?

A. I cannot recall with any great precision.

Q. I understand, but do the best you can.

(Witness complies.)

A. I think I may have gotten up and wandered here. I may have gone over to the loudspeaker and back. And [9-135] I may have gone to this end of the room and back, and something like that, perhaps.

Q. You have drawn orange lines running from the chairs to the left-hand speaker and from the chairs over to the right-hand side of the drawing, right?

A. Yes.

Q. All right.

A. There is a little bit of speculation here, because I really don't recall the precise path of my travels about here.

Q. All right. A. It's been too many years.

Q. Would you please take the blue marker, which I hand you, and draw the location of the wall to wall piano which

you heard?

(Witness complies.)

Q. Now, you have drawn a blue line toward the top of the drawing, immediately behind the two speakers, extending from side wall to side wall?

A. Yes.

Q. Is that right? A. Yes.

Q. And, finally, would you take the red marker, which I give you, and draw the location of the ten foot wide violin when you first heard it? Is that when [9-136] you first heard it, ten feet wide?

A. You say "ten," or is it -- excuse me one moment, please?

Q. Sure. A. Ten or nine?

(Pause.)

A. Yes, ten. Okay.

(Witness complies.)

A. Something like that.

Q. So you have drawn a red line in the top of the room or the -- at the back wall behind the speakers, approximately?

A. Essentially, yes.

Q. Now, would you, with the same red marker, draw the path which that violin followed as it wandered about the room?

A. Well, I cannot draw a precise path. I can only indicate by means of motions made by this pencil along the drawing in a crude approximation of what it might have been. I cannot give you exact points. I don't remember.

Q. I understand.

A. I cannot say it was here, this dimension, at one time, and it was here at another time. I can only indicate in a broad way what my perceptions told [9-137] me my sound seemed to be doing.

Q. That is all we ask is your best memory.

A. Well, if I -- as I sat in the chair and listened to the loudspeakers playing, I found that it appeared to me that at one given point in time the violin might be located, say, here.

(Witness draws.)

Q. You have drawn a circle with an X in it? A. Yes.

Q. All right.

A. At some moment or two later, as I was trying to concentrate to discover where the violin might be, it seemed to have shifted position. It seemed to be, say, coming from here.

(Indicating.)

Q. Could you put a letter on the circle you just drew, like a Y?

A. A Y will superimpose on the X. You wouldn't see that too well. Suppose I label them above the circle?

Q. That would be fine.

A. X and Y, is that all right?

Q. Sure.

(Witness complies.)

Q. All right, and did the violin wander anywhere else? [9-138] A. Yes, sometimes it would appear to be coming from, let's say over here (indicating).

Q. All right. Anywhere else?

A. Well, in general, I would have to say that from one time or another, it would appear to originate from any point between those two arrowheads. The sound would appear as if it were originating anywhere between those two arrowheads which I put here. (Indicating).

Q. And by the two arrowheads, you refer to the arrowhead at either end of the red line which extends approximately from the side of speaker to the side of speaker; is that right?

A. Approximately.

THE COURT: How wide is the room, did you say?

THE WITNESS: This room is 18 feet wide, sir.

Q. And have you completed drawing where you remember the violin wandering?

A. I would fill -- I'd probably end up filling that space in between with little x's because it seemed to shift its location from moment to moment.

Q. Between arrowheads? A. Between arrowheads, I would end up with a lot of [9-139] circles.

Q. All right. The record will be clear then. Did I ask you did the piano wander about the room?

A. I believe you did.

Q. What was your answer? A. I believe I didn't recall that it did.

Q. All right. Now, is that the phenomenon which you intended to describe

when you said in your draft report to editorial that instruments tended to wander about the room?

A. That is essentially the phenomena I intended to describe when I said the instruments tended to wander about the room. Let me read the article to see if that was exactly what I said.

Q. Perhaps you'd like to refer to Exhibit 10, which is your draft report also?

A. Do you need me to stay here?

Q. No, you may resume the witness stand if you wish.

(Witness resumes stand.)

A. I'll get my reading glasses back on.

Q. Certainly. I know that problem well. In fact, in your draft report to editorial, you used slightly different language, didn't you? You said in

Plaintiff's Exhibit 10, [9-140] "Instruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room," and so forth; right?

A. Yes.

Q. Those are your words? A. Those are my words.

MR. POLLET: Mr. Perry, could we just have the page number identified, please?

Q. Could you tell us the page number I just read from? A. Oh, yes. Page 29.

THE COURT: Of which exhibit?

MR. PERRY: Plaintiff's Exhibit 10, your Honor.

* * *

[9-145] Q. All right. Would you agree that as of June 1970, with conventional loudspeakers, the sound may appear to come from any or all points between the speakers?

A. Mr. Perry, I think I have already pointed out that if you define it sharply enough, I can answer that question. If the recording that is being played [9-146] is that of an orchestra with violins on the left and trumpets in the middle, let's say, the double bass on the right, in that case when you play such a recording on a conventional loudspeaker, you would in ordinary circumstances hear the violins on the left, the trumpets in the middle, and double bass on the right.

Q. Yes. But with an individual instrument, you would not hear sound spread between the two speakers, is that your testimony?

A. In a properly functioning stereo loudspeaker system with an individual instrument at a fixed location during the recording process, not moving about the room, actually, you should hear the sound

as coming from one given position on the wall in front of you.

Q. From a single fixed position? A. Yes, if you are seated in a chair, Mr. Perry --

Q. Yes.

A. -- some distance from the loudspeakers and listening to a pair of stereo loudspeakers located some ten or twelve feet in front of you, you should hear that instrument localized or apparently coming -- The sound of that instrument localized or apparently coming from some location on that wall. It should not shift.

[9-147] Q. Would you then agree, sir, that as of May 1970, the average person would regard it as a disadvantage to have loudspeakers which made the individual instruments appear to wander about the room?

A. Not necessarily, Mr. Perry. We did not say that either in our story. What we said was that with orchestral music, such effects seemed inconsequential. Then we went on to say But we think -- we think. It's an opinion -- they might -- and we qualified it again -- become annoying when listening to soloists. We stated it with a double qualification and totally eliminated the orchestral music. That is lots of instruments. There, we felt that was of no consequence whatsoever.

Q. Didn't you think that people reading about the gigantic wandering instruments might be deterred from purchasing the Bose 901 as a result?

A. They might have just as well been fascinated to hear this and have been spurred on to buy it.

Q. Are you serious?

THE COURT: What?

THE WITNESS: Spurred on to listen to it and to buy it. The effect is not a complete negative. We mentioned that in the story.

Q. Are you trying to be funny, or is that -- [9-148] A. I'm not trying to be funny, Mr. Perry.

MR. POLLET: Objection. The counsel is arguing with the witness.

THE COURT: Yes, that is all.

Q. Do you really -- do you mean, sir, that you thought that people might regard the gigantic wandering instruments as an advantage which would induce them to purchase these speakers?

A. There it is in print.

Q. No, No. I'm asking what your state of mind was. When the article was published, did you think that readers might read about the gigantic wandering

instruments heard through the Bose 901 and thereby be induced to purchase Bose 901 speakers?

A. I said I thought they might be induced to go and listen to these effects and might grow to like them.

THE COURT: No. When you use the word "worse," it means that it's compared with something else. In this case, it's obvious it was compared [9-151] with what immediately preceded it. So what immediately preceded it was not something good, but rather something undesirable. Otherwise, you wouldn't have said "worse," would you?

THE WITNESS: Or perhaps there was a greater error on perception of what would have been a conventional error. In other words, there was an error in the perception of the sound, as indicated by the first sentence; and that this error

in perception is intensified still further when the instruments grew to gigantic proportions. The very effect which is the criterion of the loudspeaker, we were quick to praise, and this is, in my opinion, based upon the very effect we have noted here. We said-- I'm afraid I cannot find that one sentence I was looking for. Here it is. I have it. The Bose 901 seemed-- when it came to music, the panelists immediately noticed a remarkable difference between the system. It's that difference that counts. The Bose 901 seemed considerably more spacious and reverberant actually to the point of giving the impression that the walls of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position. This already indicates there was something different [9-152] about the

Bose loudspeaker in the manner in which it reproduced stereo sounds compared to other loudspeakers. A very positive and beneficial thing, as a matter of fact. But there was a change in perception. Listeners would hear things differently with the Bose than with other conventional loudspeakers. How annoying that might come was qualified in our report. We said, "With orchestral music such effect seems inconsequential. But we think they might-- might become annoying when listening to soloists." And that is the way we saw the net overall effect. It was conceivable to us that individuals, some individuals, might think them annoying, and they would have to listen for themselves. As we say later, "Listen for yourselves and decide for yourselves." It was not an outright negative approach. It's quite positive,

I think.

* * *

[9-153] Q. Mr. Seligson, why did you use the words "tended to wander about the room" to describe what you have drawn on the board?

A. Well, I don't know what made me pick that particular choice of words. Would you have been more satisfied if we said "across,"-- I think not-- instead of before. I have the feeling you would have objected in either event. The word "about" meant just as I drew it on the board. Now, I so testified in my deposition--

Q. Would it have been more accurate in your judgment to say that the instruments tended to move back and forth between the two speakers?

A. No, I don't think so, taken in context of the way it's described.

Remember, the effect is carefully described in a few sentences later. It's hard to mistake.

Q. Is there anything in the article which you think conveys to the reader the idea that the instruments stayed down at one end of the room and didn't come out and wander about, like you wandered about, where you have drawn the orange line?

[9-154] A. Yes.

Q. What is that?

A. I would think that the reader would get that from reading that a violin appeared to be ten feet wide and a piano stretched from wall to wall. This is no hint of depth or whatever, entering into the room.

MR. PERRY: I'll offer as the next exhibit of the plaintiff, the sketch made by the witness of the listening room and

the gigantic wandering instruments.

MR. POLLET: No objection, your Honor.

THE CLERK: Plaintiff's Exhibit Number 29.

(Sketch made by witness marked Exhibit 29.)

THE COURT: Admitted.

* * *

[10-2] Q. Good morning, Mr. Seligson. Calling your attention once more to Plaintiff's Exhibit 7, the copy of the article published in the May, 1970 issue of Consumer Reports, at Page 274 is this language:

> "Worse, individual instruments heard through the Bose system seem to grow to gigantic proportions and tended to wander about the room."

You told us yesterday that the only instrument that you observed to be moving during the special listening test of

January 23, 1970, was the violin. Can you think now of any other instruments, having in mind that the plural form of the word is used in the article, that moved about on that day?

A. Well, Mr. Perry, I recall that some human voice [10-3] did, and in that broad sense you might consider the human voice an instrument, I do recall that, but I don't recall any of the others.

Q. All right. Now, after January 23, 1970, was the next occasion on which you listened to the Bose 901 speakers June 16, 1970, when you demonstrated them for Mr. Florman?

A. I believe so, yes.

Q. And who else was present on that occasion?

A. To the best of my recollection, there was Mr. Morris Kaplan, Mr. Florman, of course, Mr. Lefkow, myself, and I

believe Mr. Nagel, sir.

Q. And did you set up the speakers on that occasion in the same location that you had on January 23, 1970?

A. No, Mr. Perry.

Q. Yesterday, you drew for us a sketch, which is now Plaintiff's Exhibit 29, of how the loudspeakers were set up on January 23. I wonder if you would be good enough to step down and make a similar sketch -- was it in the same listening room?

A. Yes, it was.

Q. Of the listening room on a different piece of paper, showing how the speakers were set up on [10-4] June 16 of 1970. I will get you a marker. If you would use the black to outline the room and the location of the speakers, please?

(Witness complies.)

A. This is the outline of the room;

and on the 16th, the speakers were here. Again, this is only a rough sketch. And I am not claiming --

THE COURT: You better speak up, the reporter has to take it down.

THE WITNESS: Again, this is a very rough sketch and I am not certain that the scale of the drawing is proper. Soemthing like that.

THE COURT: Is that a new diagram?

THE WITNESS: Yes, this is a new diagram, your Honor.

THE COURT: This time you have it at the bottom of the page.

Q. You have drawn two five-sided figures toward the bottom of the square or rectangle, which represents the walls of the room, is that correct?

A. Yes, that is correct.

Q. Incidentally, where was the door to the listening [10-5] room?

A. It was, let's see now, it opens up here. It was over here. I believe -- I am trying to remember which side the hinge was on.

Q. It doesn't really matter. If you could just point out where the door was.

A. Over here.

Q. You have drawn two lines and a box on the right-hand side to show the door?

A. That is the door, yes.

Q. Fine. And could you, with the orange marker, please indicate where the various persons who were present while the speakers were played on that day?

A. There were several people and they were seated roughly in this area. I am not drawing individual chairs. There were several chairs.

Q. All right. You have indicated in orange a rectangle with cross hatching to

show approximately where the people were located, right? A. Yes.

Q. On this occasion -- and I don't want you to tell us what anybody else said, but only what you [10-6] observed yourself, on this occasion, on June 16, 1970, did you think that you heard any instruments wander about the room?

A. Yes, Mr. Perry.

Q. Which instruments? A. Well, we played a number of them and I can't recall specifically -- certainly heard violins. I heard the human voice. There may have been others, but I don't recall precisely the instruments and the manner in which they wandered.

Q. Can you indicate for us with the red marker on this chart where the violin appeared to wander or move on that occasion?

A. Here I am not quite as certain.

I was observing the test, but was not as immersed as I was during the special listening test, so I will indicate an area that would roughly indicate this. I would say somewhere -- and this is an approximation -- somewhere in this region. I will cross hatch it.

Q. Indicating that the cross hatching in red at the bottom of the drawing, right? A. Yes.

* * *

[10-16] In the 1979 test did you hear any instruments which to you appeared to wander about the room?

A. In the sense that I described yesterday, that it [10-17] was difficult for me to focus on a specific location from which the sound appeared to come, that it seemed to shift from moment to moment, or as my attention would lapse for a moment and then return to the

instrument, that was true.

Q. And with respect to what instruments did you hear this wandering phenomenon in 1979?

A. I did notice it for the violin.

Q. Was it essentially the same phenomenon which you had described with respect to the September, 1970 test, which you sketched in Plaintiff's Exhibit 30?

A. Yes, essentially the same.

Q. Did you hear it in both the morning session and the afternoon session?

A. Yes, Mr. Perry.

Q. Perhaps you would draw for us on the latest chart the apparent location of the violin during the morning and afternoon sessions.

A. All right. From such areas as this.

Q. You have drawn a red rectangle with cross hatching at the top of the drawing to indicate where you thought you heard the violin in the morning session, and a similar rectangle at the bottom of the drawing to indicate where you heard it in [10-18] the afternoon session, is that correct?

A. Yes, Mr. Perry.

* * *

[10-19] When you said the violin was ten feet wide, does that mean the same thing to you as saying the violin was wandering about the room?

A. No, I don't think they are mutually exclusive, but it doesn't mean quite the same thing, no.

A. What is the distinction between the two things?

A. With the violin wide, the impression is one predominantly of sound

coming at you from roughly the entire area in front of you. In other words, roughly from in front of the entire area. But individual notes, however, may occasionally seem to focus a little better in one location than in another and give the impression that that is where the violin is for that moment. And it is a shifting impression. It is something which is part of that vagueness which we mentioned in the story. We said simply it became apparent that the panelists could pinpoint the instruments much more precisely with a standard speaker system than with the Bose [10-20] system. It is that difficulty in pinpointing the location that leads to some of the problems. It also makes it difficult to describe.

* * *

What I am trying to get at is:

Do you recall that you heard a violin which at all times appeared to be ten feet wide and which moved, or did you hear simply sound coming from [10-21] an area ten feet wide?

A. As best as I could describe it, it would be that -- if you can imagine peering at an array of lights from a distance, a very large array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's attention upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed

the fact that there is a broad light source behind. This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you.

* * *

[10-22] Q. You are aware, aren't you, that a violin playing notes of different frequencies will have a different radiation pattern or polar radiation pattern for each frequency?

A. Yes, Mr. Perry. Dr. Bose has discussed that earlier in his testimony, I believe.

Q. You don't disagree with that, do you? A. No.

[10-23] Q. And doesn't it follow that as the radiation pattern of the violin changes with the frequency, that at times

the different notes will appear to come from different spots around the violin because the radiation is stronger in one direction at one time and another direction at another time, depending on frequency?

A. I would expect that to happen so infrequently that it would not influence my ability to judge the localization or the effective image with the violin.

Q. You would expect it to happen, but you would not expect it to make the violin sound enlarged, isn't that correct?

A. In effect, yes.

Q. And what you heard on January 23, 1970, was entirely consistent with what you would have expected to hear with an actual violin playing notes of different frequency, wasn't it?

A. You mean reproduction throughout the Bose loudspeakers?

Q. Yes.

A. No, I don't think it was consistent with what I would hear from a violin. We are dealing with a completely different animal, so to speak. [10-24] This is a recording and it is being played back through a loudspeaker whose directional properties did not resemble those of the violin, if I understood Dr. Bose's drawings correctly.

Q. Well, with respect to the apparent movement of the location from which specific notes came, that you observed on January 23, 1970, wasn't that entirely consistent with what you would expect a live violin playing between the two speakers and playing notes of different frequency?

A. No.

Q. How did the two differ?

A. The directional properties of the

Bose 901 loudspeaker are very much unlike that of a violin.

Q. Is that the only way you can distinguish the two?

Q. Well, of course there are many other ways you can distinguish a violin from a Bose loudspeaker, but certainly --

Q. I am talking about the specific phenomenon about different notes appearing to come from slightly different locations.

A. Mr. Perry, I think that the penomenon may be [10-25] accounted for by the fact that the Bose loudspeaker directs most of its sound energy away from the listener. It is designed deliberately to do so in a predominant fashion, whereas the violin does so in an entirely different fashion and not at all like the Bose 901 loudspeaker. One would not be surprised, I think, that their

behavior in terms of listener perception would be different.

Q. Well, we will get into the acoustical theories in a few minutes. But for the moment I want you to tell us this: With an actual violin, you would expect some apparent movement of the source of sound as frequency changed because of the varying polar radiation patterns, would you not?

A. I would expect them to occur relatively infrequently.

* * *

[10-47] THE COURT: What I am groping for is this: How would such minimal differences affect the sound in such a way as to cause the listener to think of the instrument as wandering?

THE WITNESS: Well, oh, he -- well, that is a different question. You are not talking about the quality of the tone

of the sound, but the wandering has to do with the judgment of where the sound appears to originate, from the localization of the sound. And there, the time of arrival can be of great significance. The time by which the sound passes the two ears of the head can strongly determine for the listener where he seems to believe the sound is originating. He uses those clues the way a rangefinder or optical rangefinder uses light being separated by the two mirrors at the end of a rangefinder. The minute time differences in the two ears is sufficient to force a judgment upon the listener, which I suppose we are born with or perhaps learn to acquire, and we swivel our [10-48] heads accordingly.

THE COURT: But the differentials in the arrival of the sound are identically the same with respect to all sounds that

originate from certain sources.

THE WITNESS: From a certain point, yes, your Honor. In other words, if they were --

THE COURT: Here we are dealing with a behavior on the part of an instrument such as the Bose loudspeaker, which apparently behaves differently from other loudspeakers.

THE WITNESS: Yes, it does. There is a very big difference.

THE COURT: Can that be caused by the differences in the time of arrival that we are talking about because the time of arrival is the same, identical with all sounds that originate in that particular place, regardless of whether it is a Bose instrument that sends it out or whether it comes --

THE WITNESS: There is a vital difference in the time of arrival between

the Bose and other loudspeakers, if we discuss that aspect of it.

[10-49] THE COURT: Even though they are located in the exact same position in a room?

THE WITNESS: Yes.

THE COURT: How can there be a difference in the time of arrival? The speed of sound is the same under similar circumstances. The speed of the sound which emanates from one instrument will be the same as the speed of sound emanating from another instrument, isn't that true?

THE WITNESS: The speed of sound is the same, your Honor.

THE COURT: All right. How can there be differences in the time of arrival?

THE WITNESS: The difference is that the conventional loudspeaker directs all of its sound toward the listener; whereas

the Bose speaker directs a great portion towards the walls.

THE COURT: We are not in an open space, not in a shell, a concert band shell, but we are dealing with a room that is 15 by 20 or whatever it is.

THE WITNESS: That is right.

THE COURT: Which is relatively [10-50] small.

THE WITNESS: It will amount to the order of between 2,000ths of a second and 10,000ths of a second.

THE COURT: But that difference is the same regardless of the instrument from which it emanates, if they are situated in the same location in the same room?

THE WITNESS: But the conventional loudspeaker, your Honor, will not send its high frequency sounds towards the walls of the listening room the same way

the Bose does because they are blocked by the body of the cabinet. Those sounds go directly toward the listener. In that case, the predominant force of sound is directed away from the listener toward the walls, and a small portion is directed by means of one loudspeaker toward the listener. As a result, with the Bose loudspeaker the listener will experience two sets of arrivals, first from the sound of the loudspeaker and then, a fraction of a second later, the sound which comes from the rear walls.

THE COURT: You are not conscious of that?

[10-51] THE WITNESS: The listener is not conscious of that slight different in the time of arrival. The listener, however, is conscious of the effects which it can produce. That is a well-established law. If your Honor will

remember, the only clue we have to a location of sound source is the difference in time of arrival of the two ears. They are about, say, eight inches apart in the head. Yet, that slight difference, which is in the order of perhaps 8/10ths of a millisecond, is sufficient to clue us in on it. They have, in the case of a Bose loudspeaker, a far larger time span, 3 milliseconds, larger than what we utilize in two-eared listening. And that is certainly significant in terms of listener perception.

* * *

[10-102] **Q. Do you know of any technical or professional paper or textbook which refers to a musical instrument which appeared to a listener to wander about a room when its sound was played through a loudspeaker?**

A. I don't recall any, Mr. Perry.

* * *

[11-70] "Q. I am going to read another quote.

'As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high and medium accuracy groups.'

'Please identify the Consumers Union test records which you believe support that statement.

"A That statement was a judgment based on our examination of the [11-71] results of the listening test, which was analyzed by Dr. Pike, and which is called the listening test for accuracy, in which the Bose loudspeaker ranked in the middle groups.

"We felt, however, that that was not a fair ranking of the Bose loudspeaker, because the listening test for accuracy asked the listeners to respond to differences in sound, and in view of the fact that the Bose 901 had a type of aural space that was different from the forward radiating loudspeakers of most of the other loudspeakers in the test, that such a difference

would crop up unfavorably to the disadvantage of the Bose.

"Therefore, we felt that on the basis of our listening, as reported in books, Plaintiff's Exhibits 11 and 36, that the Bose was a much better loudspeaker than the listening test for accuracy would indicate.

"On the other hand, such statements [11-72] as found in Plaintiff's Exhibit 36, 'Have clear sound but noticeably booming in lower mid range. After listening for about an hour boom became fatiguing and annoying.'

"And statements in Exhibit 11: 'Appears to have exaggerated mid bass. Not particularly objectionable, but noticeable.'

"And the statement: 'Lower mid range or upper bass sounds boosted, adding a 'tiring,' annoying quality for the sound,' led us to the judgment that the Bose loudspeaker, if it had been ranked as quoted from our article, would be just slightly below the top accuracy groups."

* * *

[11-81] MONTY FLORMAN, SWORN

DIRECT EXAMINATION BY MR. POLLET

Q. Mr. Florman, could you, please, state your full name and home address.

A. Monty Florman, .31--

THE COURT: Is that F-l-o-r-m-a-n?

THE WITNESS: F-l-o-r-m-a-n.

THE COURT: --m-a-n, Florman.

A. 31 Vernon Parkway, Mt. Vernon, New York.

Q. Are you employed, Mr. Florman? A. Yes, I am.

Q. Where are you currently employed? A. At Consumers Union.

Q. Is that the defendant in this case? A. Indeed.

Q. What is your current job position at Consumers Union? A. I am technical director.

Q. Can you tell us, just in general fashion, what your duties and

responsibilities are as technical director?

A. Yes. I'm responsible for all of the laboratories which comprise six technical divisions at Consumers Union and whose output comprises almost entirely all of the product rating material that is published in Consumer Reports magazine and in other publications of Consumers Union.

Q. How long have you been employed at Consumers Union? A. Approximately 31 years.

[11-83] Q. And during the years 1969 and 1970, I take it then, you were engaged as C.U.'s associate technical director? A. Yes.

Q. Can you tell us what your duties and responsibilities were in connection with C.U.'s electronic division in the period 1969 to 1970?

A. They were analogous to my present duties but limited instead of to the entire technical department which I now am responsible for. Rather I was in charge of three of the technical divisions at that time: the electronics division, the appliance division, and the special projects division.

Q. And what duties and responsibilities did you engage in with respect to the electronics division on '69 and '70?

A. Overseeing the approximately ten projects, ten technical test projects that would be in progress at any given time in terms of administering them, keeping track of them, reviewing reports of various kinds emanating from the definitions in the course of the project up to and including the report to editorial which is the technical report

provided to editors of Consumer Reports.

Q. Would your duties and responsibilities then end with the completion of the technical report?

A. No.

Q. Can you tell us what they would be beyond that point?

A. Subsequently to my review of the technical report and my [11-84] comment thereon and consultations about that technical report with the division head of the electronics division in this case, in this instance I should say, there would be a subsequent series of reviews following submission of the technical report to the editorial department where that report would be converted by professional writers into a report for publication in the magazine. That report, in turn, would be turned over the electronics division for review,

checking, line by line checking, and it would come from that department to my office for review by me in much the same way that the original report was reviewed by me. It would then be turned over to the editorial department and changes by them, perhaps in consultation with us, if there were any questions. The same process would pertain for the galley proofs, for the second galley proofs, for the page proofs, for the second page proofs, and for what used to be called cast pages which were the final proofs that went to the principal for publication.

* * *

Q. Mr. Florman, are you familiar with the article on loudspeakers which was published in Consumer Reports in May 1970 issue? A. Yes, I am.

Q. And were the duties and

responsibilities which you carried out with respect to the preparation of these tests, the carrying out of the tests, and leading to the publication of that article similar to the duties and [11-85] responsibilities which you have just set forth?

A. Yes, they were.

* * *

[11-100] Q. Mr. Florman, has Consumers Union ever published any inaccurate information in the pages of Consumer Reports during the 30 years that you have been connected with Consumers Union?

A. We have published a great many corrections in Consumer Reports to correct errors that have been published.

Q. Does Consumers Union have any policy with respect to publication of correction of errors?

A. Our policy is to correct errors

at the earliest possible time.

Q. You mentioned that at the June 3rd meeting Dr. Bose seemed to you to make a concerted attack upon Mr. Seligson's competence. Were you surprised at that?

A. Yes. I expected something quite different.

Q. Do you consider Mr. Seligson to be competent?

THE COURT: We'll have our noon recess.

A. Yes.

MR. POLLET: Yes. Thank you.

(Lunch recess at 12:57 PM.)

[11-101] Q. Can you tell us the basis for your yes answer to the prior question considering Mr. Seligson's examination?

A. Yes. Since his employment in 1956, as an electronic engineer and --

THE COURT: Keep your voice up.

A. I said since Mr. Seligson's employment in 1956 as an electronic engineer, his subsequent promotion to senior project engineer, and his then subsequent promotion to head of the electronic division, he has been involved in virtually every project that Consumer Reports has published that involved home speaker entertainment equipment, which covers the gamut from radio, stereo receivers, all kinds of amplifiers, pick ups, television sets, color, black and white, and loudspeakers, of course. And has tested and reported on and responsible for reporting on literally hundreds, if not thousands, of brands and models of these products. I measure his competence by the response of our customers as any purveyor of a product measures the quality of the product. We too sell a product, our product is

magazines. And we have two and a quarter million readers, our complaint mail, [11-102] which is a measure of our quality control, is extremely small, virtually a trickle. And in Mr. Seligson's area, there is practically no mail at all. Our reports are very well accepted, the response of manufacturers has been extraordinarily good. We have an occasional complaint, occasional letter, but by and large, that division, under Mr. Seligson's direction, has done extremely well, and indeed, we have received more capital in the electronics division than any other division so as to maintain state of the art. In other words, we have a great deal of confidence in that division and therefore spend a great deal of money on it.

* * *

[11-104] Q. Have you listened to the

Bose 901 loudspeaker subsequent to June 3, 1970? A. Yes, I did.

Q. When was that, if you can recall? A. It was within two weeks after the meeting, probably June 16.

Q. What were the circumstances which led to your listening to the Bose 901s on or about June 16?

A. A very strong curiousity, and beyond curiousity, a very strong sense of responsibility on my part, and also on the part of the then technical director, Morris Kaplan. Our concern was whether, in fact, an error had been made or the loudspeaker mischaracterized in any way, and we both felt that it was extremely important that we listen to the loudspeakers and make our own, come to our own conclusions.

* * *

[11-106] Q. Can you tell us, please,

what you observed or heard during the listening test?

MR. PERRY: Again, if that calls for what somebody else said, I object on the grounds of hearsay.

Q. What you heard from the loudspeakers during the listening test. Please do not tell us what others may have [11-107] told you, but simply what you observed or what you heard emanating from the loudspeakers?

A. A number of selections, musical selections, were made for us. There were woodwinds, there was a piano solo, a violin solo, there was some orchestral music, was voice, and what I heard was the sound of individual instruments being unfixed in space, that is to say, the piano was much wider than any piano could possibly be. In fact, it appeared, the sound of piano appeared to extend from

wall to wall, the violin assumed yet another kind of characteristic. It was not only larger than I would expect a violin to sound, but in addition, the violin wandered about the room. It at one moment sounded towards the right, at another moment, it sounded high in the room, yet another time --

THE COURT: What do you mean by high?

THE WITNESS: Higher than the normal playing level. Perhaps as high as the ceiling. To my ear, it appeared to wander about. The voice similarly was not fixed, and like the violin, wandered about the room in a way that exactly, in my judgment, exactly paralleled what we reported about these loudspeakers in the May 1970 issue.

* * *

[11-111]

CROSS EXAMINATION by Mr. Perry

* * *

[11-115] Q. Mr. Florman, did you make this memo dated June 4, 1970, on June 4 or on June 3 of that year?

A. If it's dated June 4, I would assert that I wrote it on June 4.

THE COURT: Mr. Perry, for the record, what is that document? Did we have it marked for identification?

MR. PERRY: I haven't yet, your Honor. I will if you wish.

THE COURT: Well, it's my practice the moment you show a document to a witness, you have it first marked for identification.

MR. PERRY: Fine.

THE COURT: The record will be clear.

MR. PERRY: We have lost the clerk for a [11-116] moment, but I'll make a note to have it marked.

THE COURT: What is it a memo --

MR. PERRY: It's a memo dated June 4, 1970, from Mr. Florman to file with a copy shown on the face to Mr. Kaplan. And the subject matter is described as BOSE.

THE COURT: Does this purport to be the substance of what happened on that occasion?

THE WITNESS: Yes, your Honor.

THE COURT: On the 3rd?

THE WITNESS: On the 3rd.

Q. Mr. Florman, did you testify earlier that Dr. Bose didn't say on June 3 what he objected to about the contents of the article that your company had published? A. Yes.

Q. Didn't he say that he thought that the description of the function of the equalizer in the Bose 901 loudspeaker system had been erroneous?

A. I think I may have made a

reference to that in my memo. May I have a look at it?

Q. First, I would like your memory?

A. My memory doesn't serve --

THE COURT: Can you have that marked now?

MR. PERRY: Yes. Could this be marked as [11-117] the next Plaintiff's Exhibit for identification?

THE CLERK: Plaintiff's Exhibit 33, so marked.

(Plaintiff's Exhibit 33, Florman memo dated 6/4/70, marked for identification.)

Q. Perhaps if you look at the paragraph on Page 2 which bears the number 1, that would be of some help to you.

(Pause.)

A. The answer to your question obviously is yes, there was some such discussion.

Q. And in looking at Plaintiff's Exhibit 33 for identification, does that refresh your recollection that Dr. Bose complained about several different aspects of the statements the defendant had made about his loudspeakers?

A. Yes, indeed.

Q. And I want to read you a sentence from your memo and ask if it's consistent with your memory of what was said: "Bose took extremely strong exception to the concept of wandering and expressed the view that on theoretical grounds such an observation was patently impossible." Did Dr. Bose in substance say that at the meeting?

[11-118] A. I can only respond in the context of what I wrote. I don't remember it happening.

* * *

[12-142] Q. Now, I want to read to you,

sir, another portion of your memorandum of June 4, 1970, Plaintiff's Exhibit 33 for identification, and ask you to explain what various initials mean. It reads as follows:

> "After the meeting W.S. reported to M.F. that C.E.W. felt that we were, in his opinion, weakest in our arguments about the wandering instruments."

THE COURT: What are you reading from?

MR. PERRY: Mr. Florman's memorandum of June 4, 1970, your Honor, Plaintiff's Exhibit 33 [12-43] for identification.

Q. What or who was meant to be identified by the initials W.S.?

A. Walker Sandbach.

Q. He was the executive director of Consumers Union at that time? A. Yes.

Q. M.F. is reference to you? A. Yes.

Q. C.E.W. is who? A. Colston

Warne.

Q. He was the president of the organization at that time? A. Yes.

Q. So the meaning of the sentence, I take it, is that after the meeting Mr. Sandbach reported to you that Mr. Warne felt that you were weakest in your arguments about the wandering instruments, is that correct?

A. That is correct.

Q. And did that actually happen?

A. I am sorry?

MR. POLLET: Did what actually happen?

Q. Did Mr. Sandbach report to you that Mr. Warne felt that Consumers Union was weakest in its arguments about the wandering instruments?

[12-44] A. That actually happened.

* * *

[12-48] Q. Let me ask you this, Mr.

Florman: During the meeting on June 3rd, didn't you hear Dr. Bose say that what was reported in Consumer Reports about the enlarged, wandering instruments, was a scientific impossibility or words to that effect?

A. Yes.

Q. Do you remember now that he did say that at the meeting?

A. I believe he did say that was-- the words scientific impossibility--

Q. Something like that? [12-49]

A. Something like that.

Q. And you knew, you had read the article, the May, 1970 article by that time, hadn't you? A. Yes.

Q. And is it your testimony that after Dr. Bose said that the widened, wandering instruments was a scientific impossibility, you never went to Seligson and said, "Larry, what did you hear," or

something to that effect?

A. No, I wanted to hear it myself before questioning him.

Q. And to this date, you never asked him what he heard? A. No.

* * *

[12-114] Q. Mr. Florman, you approved the publication of an article in the May 1970 issue of Consumer Reports which at Page 274 says, "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." Did you approve that language?

A. Yes.

Q. When you approved that language, sir, what was the meaning to you of the words within it "wander about the room"?

A. In the context of having read the whole article, starting on page 274, my reading of that particular [12-115]

paragraph and sentence seemed to grow logically out of the story, and I had no -- I had no reason to question --

THE COURT: No. The question is: What did the quoted language mean to you when you read it?

Q. The words "tended to wander about the room," what did you understand those words to mean?

A. Well, what I believed was that when listening to the loudspeaker, the instruments referred to were not localized and tended to wander around the room. I don't know how better to answer.

Q. I guess I'm asking you, if you can, to tell us what you understand the word "wander" to mean in that context.

A. Well, very much as I described this morning. Of course, that was after I had heard the loudspeakers. But before having heard them, it meant a lack of

localization; that is, as if listening to an orchestra or to a solo or to a group of instruments, what it meant to me was that the instruments did not remain fixed in a specific location.

Q. When you read those words in 1970, did you construe them as meaning that the instruments [12-116] had appeared to move about in random fashion throughout the room without following any fixed pattern?

A. Well, the mental image I had was of the sound moving about in front of the listener.

Q. Would you read the question, again, please?

(Question read.)

A. No.

Q. You took them to mean that the instruments moved in one plane, is that correct?

A. Well, in a plane in front of the listener, rather than behind the listener.

Q. Why did you so construe the words in 1970, when you read them?

A. Out of experience, sitting on the couch and listening to a loudspeaker my experience has been that the -- that the music emanates from in front of me rather than from behind me.

Q. Yes.

A. And if the sounds were to wander about the room, it would wander about in a 180 degree arc in front of me.

Q. Wouldn't you agree that the normal average person reading the words "wander about the room," in that article, in its context, would have a mental [12-117] impression of instruments moving about the room, meaning into various locations throughout the room?

A. I am very reluctant to speculate on that. I don't know what the average person would derive from this. I have not questioned anybody. I have not questioned anybody.

Q. Well, you approved the language? A. Yes, but I haven't done a survey to find out what the average person would think.

Q. What did you intend the reader to think?

A. That there was something unique and special about this loudspeaker and that one of the things that Consumers Union was pointing out was that the characteristics of the speaker were such that the sound appeared, the sound of instruments, appeared to move rather than remain stationary.

Q. When you approved the publication of that language, what did you intend

readers of the article to infer from the word "about," as used in the phrase "wander about the room"?

A. I must say, I never -- I never really pondered that.

Q. If you ponder it now, would you agree that the word "about," as there used, is synonymous with [12-118] around?

A. Yes.

Q. So it means wander around the room, right? A. Yes.

Q. Right? A. Yes. Yes.

THE COURT: Your answer is yes?

THE WITNESS: Yes.

* * *

[12-124] Q. Would you agree, sir, that as of 1970, the magazine Consumer Reports had an excellent reputation for integrity and accuracy? A. It did and does.

Q. And would you agree that millions of people tended to rely upon the

information contained [12-125] in the magazine in deciding what products to buy?

A. It's my hope that they did, yes.

Q. You have no reason to doubt it, do you? A. No.

Q. And would you agree that Consumers Union, in 1970, had the power by giving a bad report to a product in some instances to virtually destroy the marketability of that product?

A. No, I have no such information. In fact, I have contrary information.

Q. At least you would agree, wouldn't you, that a negative report on a product in your magazine might well tend to diminish the sales of the product?

A. No, I couldn't agree with that.

Q. You couldn't? A. No.

Q. You don't think the people read the magazine to help decide what to buy?

A. I certainly agree with that.

Q. And don't you think they act upon the recommendations in the magazine?

A. I trust that they do, but the studies that have been done by outside agencies have indicated that sales of products do not necessarily decline as a consequence of a poor rating in Consumer Reports.

* * *

[12-128] MR. POLLET: Your Honor, defendant has no redirect. We would like at this point to move that Plaintiff's Exhibit 33, which has been for identification, be introduced into evidence, your Honor.

MR. PERRY: I have no objection.

THE COURT: Admitted.

(Plaintiff's Exhibit 33 entered in evidence.)

* * *

[12-129] ALAN LEFKOW, Sworn

Direct Examination by Mr. Beil

Q. Mr. Lefkow, will you please state your name and address for the record.

A. Alan Lefkow. I live in Thiells, New York.

* * *

[12-130] Q. Are you currently employed at the Consumers Union? A. Yes.

Q. What is your title now?

A. I believe it's -- it's either senior project engineer or senior project leader. It changes every time the union contract changes.

* * *

[12-138] Q. Did you participate in the 1969 and 1970 test of loudspeakers at Consumers Union? A. Yes, I did.

Q. Was this your first experience with laboratory testing of loudspeakers?

A. My first formal experience.

Q. Had you had some informal experience prior?

A. There was some simple tests that were part of the laboratory courses in the undergraduate school.

Q. Had you ever listened to loudspeakers prior to this?

A. Oh, yes, over all the years previous to that, all the shows and hi-fi stores whenever possible.

Q. In preparation for these tests at Consumers Union, did you receive any kind of training in the measurement or evaluation of loudspeakers?

A. Yes, Mr. Seligson, on a continuing basis conducted somewhat, if you will, individual class lectures strictly for me using the blackboard, and I studied many textbooks that were available in the laboratory, particularly Beranek, Acoustics was one of the [12-139]

main texts that Mr. Seligson was concentrating on in his lectures, and whatever other textbooks were available.

Q. Do you remember which ones they were?

A. There was several. There was Fundamentals of Acoustics. That, I think, is by Kinsler & Frye. Then there was Olsen's -- Olsen had two books; they're Acoustical Engineering, and there is a first and second edition. There was a very funadmental book, Vibration and Sounds, by Morse. And then there was another book. Beranek had another book, Acoustic Measurements.

Q. You read these books in preparation for these tests?

A. I read the portions of the books that were pertinent to the tests we were doing.

Q. You said Mr. Seligson conducted

classes or tutorials; did he also conduct any kind of experiment in preparation for the testing of the loudspeakers?

A. Yes. Whenever he covered a principle, he tried to actually go to the laboratory and demonstrate. I would actually take a measurement, and we would actually look at that in detail. I remember one occasion where he actually asked me to go and measure the parameters of a loudspeaker driver, just following the techniques in Beranek, Acoustical [12-140] Measurements, and then do some calculations on it, and then try the driver out and see if indeed the calculations matched the results.

* * *

[12-141] Q. Were you concerned during the participation in this test to please your superior, Mr. Seligson, in any way?

A. I don't understand what you say,

please. I carry out his directives.

Q. Did Mr. Seligson ever indicate to you that he wanted you to follow his views as to loudspeakers and [12-142] what the tests showed, or to be independent, or to criticize him?

A. No, he very clearly said that I should exercise a complete independent judgment, speaking up whenever I felt that I had a criticism or a comment to make. And he also asked me what I thought and, you know, did I agree or disagree with whatever he was saying; so on and so forth. That was continuous throughout the project.

Q. Did he ever say to you or indicate to you that if you didn't agree with him, you wouldn't pass probation?

A. No.

Q. Did he ever imply it in any sort of way?

A. No. As a matter of fact, he kept reassuring me constantly to speak my mind, you know.

* * *

[12-150] Q. Let me finish the question. Who else besides you participated in the special listening test on January 23, 1970? A. Mr. Seligson.

Q. Could you describe for us how the test was conducted?

A. Well, we had the Bose 901 loudspeakers set up in the listening room, and we had a -- - well, we happened to have an extensive record collection, and we played a variety of records covering as much -- as wide a range of different types of music as we wanted to listen to, and we listened for several hours. We sat in different positions, walked around, and that is basically it.

* * *

[12-154] Q. Can you tell us what you heard when you were listening to something other than orchestral music?

A. Yes, we played a monophonic record, or it may have been more than one record. I recall one in particular, and that had a wide central image sound image. [12-155] In other words, the conventional stereo monophonic sound usually seems to emanate from the fairly sharpest point in the center.

THE COURT: What?

THE WITNESS: From a fairly sharp localized point. And with the Bose 901, it was a wide spreadout image.

Q. Did you listen to any soloist played through the Bose 901?

A. Yes, we listened to piano and violin. The piano was very wide.

THE COURT: Back to orchestral music. The fact that four drivers are in the

rear and then they propel the sound toward the wall, that would tend to diffuse the sound, wouldn't it?

THE WITNESS: It would be reflected at many different angles off the wall.

THE COURT: Did that improve the overall effect of the performance or take away from it?

THE WITNESS: I wasn't judging whether or not it sounded good or bad. I was trying to, you know, make clear in my mind what type of image I was actually hearing.

THE COURT: Well, wasn't that purpose to ask you to determine whether the loudspeaker that [12-156] was being tested was pleasing to ear generally or not pleasing? Wasn't that one of the objects to determine, whether or not it would appeal to the customers, to the purchasers?

THE WITNESS: That was not the purpose of this test.

THE COURT: What was the purpose?

THE WITNESS: The purpose of this test was to, you know, nail down what were the actual effects that one would hear when listening to the Bose 901.

THE COURT: Wasn't it important to determine whether the effect was pleasant or unpleasant?

THE WITNESS: That would -- that would be a matter of opinion and --

THE COURT: Well, of course.

THE WITNESS: Yes, and I just heard -- there was only one thing of the sound that I found annoying or disturbing. The orchestral spread, I did not find disturbing at all.

THE COURT: What?

THE WITNESS: I did not find the orchestral spread disturbing at all. I

thought it [12-157] was very nice.

THE COURT: All right. Go ahead.

Q. I believe you were telling us what you heard with respect to solo instruments. I think the first instrument you started describing was what you heard when a piano solo was being played through the loudspeaker.

A. Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is played, the violin -- the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers.

Q. Were these effects with soloists as pleasing to you as the effects you

heard with the orchestra?

A. No, they seemed somewhat unnatural.

* * *

[12-158] Q. Did you record your observations upon the conclusion of this listening test?

A. Yes, I wrote it in down in this data book.

Q. The data book you are referring to, is that marked as Plaintiff's Exhibit 9, on the top of the page of the cover?

A. Right. Correct.

Q. I show you the page of that data book labeled "Personal Observation on Bose 901 Upon Listening for Several Hours." Is that the page on which your observations are recorded?

A. Yes, mine started at the lower part of the page.

Q. Could you please read for the record what appears in -- is that in your handwriting?

A. Just the black ink is my handwriting.

Q. Read what appears at the bottom of the page into the record, please, and continuing onto the next page.

A. "Lower midrange or upper bass sounds boosted, adding a 'tiring', annoying quality to the sound. Sound spread out over entire wall. Stereo effect seemed diffused; trouble in [12-159] pinpointing location of soloists, especially voices. Violinists (soloists) shifted position depending on scale he was playing (different notes came from different directions.) Monophonic material sounded almost like stereo. Treble range had very smooth and pleasing quality. If it weren't for upper bass emphasis would have tone quality on par with best in project."

Q. What appears after that last line you just read?

A. My initials and the date 1/23/70.

THE COURT: What exhibit are you reading from?

MR. BEIL: Exhibit 9, your Honor.

* * *

[13-39]

Cross Examination by Mr. Perry

* * *

[13-109] Q. The basic concept of stereo sound is that there is a two-channel recording; and when the music is played back, some things come through the left channel and some through the right. Isn't that the basic idea?

A. That is not necessarily true. In many systems, you don't hear the sound coming specifically from the left or right. They come at various points between left and right. They could come from the center.

Q. Is that a common phenomenon, for the sound to come from various points

between the left and right speakers?

A. That is common, yes.

[13-110] Q. You wouldn't regard that as unusual, then?

A. Unusual?

Q. Yes. A. In a stereo system, no.

THE COURT: Well, stereo sound is a sound that comes from more than one point?

THE WITNESS: Well, you would expect it to come from more than one point.

THE COURT: If it doesn't, can you refer to it as stereo?

THE WITNESS: A stereo recording may have a soloist in the left channel; and that soloist may come from one point on the left.

Q. With stereo speakers you would expect that, at times, the sound would come from various points between the speakers?

A. If that was what was intended.

Q. Now, that would happen with any good quality brand of speakers, wouldn't it?

A. Again, if the recording had the information contained.

* * *

[13-118] Q. When you, sir, use the term "image" in the phrase "best image of all speaker systems listened to," what did you mean by image?

A. I had played orchestra material; and I considered that wall of sound a good stereo image for orchestra material.

Q. Did that orchestra material include any solo performances? A. No.

Q. You are sure of that? A. Yes, positive.

Q. What records did you listen to; did you make any record of it? A. I didn't make any record of it.

Q. Do you remember? A. I remember some of them.

Q. Ten years later you can remember the names of records you listened to?

A. Yes. Not all of them; I can only -- I remember going out and buying them for my own personal collection.

Q. Oh, I see. On November 24, 1969, or thereabouts, when you made the entries in Plaintiff's Exhibit 16, after listening to the Bose 901's had you heard [13-119] any instruments that appeared to be of larger dimensions that the actual physical dimensions of the instrument?

A. I had not listened to soloists.

Q. That is not the question.

A. I only listened to orchestra and when you say instruments --

THE COURT: For those that you did listen to, you say you listened only to orchestra records and not to solo

records. As to those that you did listen to, were the phenomenon described by Mr. Perry -- could you repeat the question?

MR. PERRY: Yes.

Q. In November, 1969, before you made the entry in Plaintiff's Exhibit 16 about the Bose 901's, while listening to the Bose 901's, had you heard any musical instruments which appeared to you to be of greater physical dimensions than the physical dimensions of the actual instruments?

A. No.

Q. And when you made those notes in Plaintiff's Exhibit 16 about the Bose 901's, had you heard any instruments in music played through the Bose 901's which appeared to wander about the room?

A. Up to this point, no.

[13-120] THE COURT: Well, how many records had you listened to on the Bose

901's?

THE WITNESS: Just a handful. I mean, up to this point --

THE COURT: A handful means seven or eight?

THE WITNESS: No. There were some records I liked the music of and I would use the same record. I only listened to the --

THE COURT: Did you listen to more than one record?

THE WITNESS: Yes, I listened for about an hour on the Bose.

Q. And during that hour you didn't hear any instruments which seemed to be of enlarged proportions, beyond the physical dimensions of the real instruments, nor any wandering instruments, is that correct?

A. That is correct.

* * *

[13-126] Q. Now, in this special listening test on January 23, 1970, only the Bose 901 speakers were tested, right?

A. Yes.

Q. Was it Mr. Seligson who said that the Bose 901 speakers were to be subjected to this test of January 23, 1970? A. Yes.

Q. Did it strike you as unusual at the time to have a test on only one pair of loudspeakers done after all the other tests had been completed?

A. Tests are never considered completed until the final report is published. There is always time to [13-127] do any tests, if you feel they are necessary. So, I didn't see anything unusual about doing tests right up to the last minute.

Q. You didn't consider it unusual to pick out one pair of speakers out of the

25 brands being tested, and subject them to a special test?

A. The Bose was not a standard speaker; so it was an unconventional loudspeaker and required additional testing.

Q. You didn't do that for the Harman Kardon, did you?

A. The Harman Kardon --

Q. Just answer the question. Did you do that for the Harman Kardon, the special test?

A. No, I don't recall a special test of this type with the Harman Kardon.

Q. All right. Now, only you and Mr. Seligson were present and participated in this special test, right?

A. As far as I recall.

* * *

[13-130] Q. Now, I am going to ask you to step down to the easel and draw us a

sketch of the listening room as of the January 23, 1970 test. Can you draw us a rectangle to represent the room and then indicate where the loudspeakers were in it, placing the door toward the bottom of the drawing?

(Witness complies.)

Q. Draw the loudspeakers, please.

(Witness complies.)

Q. Now, you have drawn in purple an outline of a room with a door toward the bottom right-hand corner of the rectangle, plus two five-sided figures to represent the 901 speakers, correct?

A. Correct.

Q. Now would you, with the orange marker, which I hand you, indicate where you and Mr. Seligson were located during the listening test?

A. Well, we didn't stay in one specific location. We moved around the

room, but the central seating position was approximately over here. Then we --

THE COURT: I think it would enable me to take a look, too, if you worked from the [13-131] the other side.

THE WITNESS: This was the central, but we moved the chairs around. We tried listening at different positions.

Q. Did both you and Mr. Seligson wander about the room during the test?

A. Yes, we both walked about the room.

Q. And you have indicated with an orange rectangle what you call the central seating position, right?

A. Right.

Q. Now, during this test of January 23, 1970, did you hear musical instruments played through the 901 speakers which appeared to you to be of physical dimensions greater than the

dimensions of actual instruments?

A. Yes.

Q. Which instruments gave that impression to you?

A. Piano, mainly a piano. The violin actually -- the source of the tones changed with the tones themselves. And whether or not you would construe that as an enlarging of the violin is academic.

Q. During the test on January 23, 1970, did you hear musical instruments played through the Bose 901 speakers which to you appeared to wander about the room?

A. Yes, the violin is the one that shifted.

[13-132] Q. Any others? A. No.

Q. I am going to give you a red marker and ask if you will please indicate on the drawing where the violin

appeared to you to be, and where it moved, if it moved?

(Witness complies.)

Q. You have drawn a red rectangle immediately to the top of the speakers and located between the point of the two speakers?

A. That is correct.

Q. Did the violin appear to you to be as wide as that rectangle you have drawn?

A. Well, it appeared to be as wide as the space between the two loudspeakers.

THE COURT: You mean the violin?

THE WITNESS: The violinist. He asked me to show the range --

THE COURT: What was the space, in your opinion?

THE WITNESS: It is approximately 10 feet or so, I would say.

THE COURT: The violin seemed to be 10 feet long?

THE WITNESS: Approximately; but he [13-133] asked me, you know, show where the notes seemed to travel.

THE COURT: Not the notes, no.

THE WITNESS: Where I heard the reflection.

Q. Where did the violin appear to you to be?

A. It appeared to be at various points in this rectangle.

Q. Within the red rectangle you have drawn? A. That is correct.

THE COURT: What about the sound of the violin, to which you testified? What did they appear to be, the physical size of the violin?

THE WITNESS: The physical size of the violinist, I got the impression that I was up close to the violin, so it would

appear to be a couple of feet, maybe three feet.

THE COURT: Long?

THE WITNESS: Yes, at any particular instant.

THE COURT: In your opinion, how long is the actual size of a violin?

THE WITNESS: I would say it is about --

THE COURT: Three feet?

THE WITNESS: No, I would say it is about [13-134] 15 inches, maybe 18 inches.

Q. You say the violin appears to be two or three feet long?

A. No, I heard this violin's tones come from points in this rectangle. Any particular moment when I heard the violin, it didn't sound 10 feet wide. It sounded something on the order of two to three feet in width.

Q. All right. What was there that enabled you to form an impression about the width of the violin?

A. Just the perception, as I heard the sound.

THE COURT: I have difficulty with that concept. I have heard a violin; we all have. I have difficulty in conceiving of sound which emanates from a violin indicating to me the size of the violin itself.

THE WITNESS: Well, I wasn't listening -- I was listening to a recording of a violin as played back on the Bose. So, that's how I heard it.

THE COURT: You formed a mental image of a violin that was three feet long?

THE WITNESS: I formed the mental image of a larger size violin. That is what I heard.

THE COURT: You see, the difficulty I

have is how anyone can tell the size of a violin, [13-135] the physical size of a violin, from listening to the sound that comes from it.

THE WITNESS: What I was hearing was the physical size of the sound in it that I was hearing.

THE COURT: I am not going to get back to sound image. We are back to sound image which means nothing definite.

THE WITNESS: I perceive the sound as coming from a point that was approximately there.

THE COURT: I heard you say that the first time, but then you asked questions making more specific reference to the size of the physical violin which you thought you heard and you said three feet.

THE WITNESS: Two to three feet, yes.

THE COURT: I say, can you tell the

size of an instrument from the sound that comes from it, the dimensions of an instrument, the physical dimensions of an instrument from the sound, can you tell that?

THE WITNESS: You mean if there was a real violin in the room?

THE COURT: Yes.

THE WITNESS: If there was a real violin [13-136] in the room, you would have some perception of the size of the violin.

THE COURT: Of the actual size?

THE WITNESS: Right.

THE COURT: Now, suppose you couldn't see the violin. You say you actually imagined the physical size of the violin that you were hearing sound from by just listening?

THE WITNESS: One would be inclined to try to imagine the size of the sound

source. Whether you would be successful or not, I don't know.

THE COURT: All right.

Q. (By Mr. Perry) How could you distinguish what you heard on this occasion with respect to the violin, how could you tell or how did you have the impression you were hearing an instrument two or three feet wide moving about, rather than an instrument six inches wide moving about?

A. You are asking me: Did I know that it was a violin or --

THE COURT: No, he didn't ask you that.

THE WITNESS: It is obvious. You can tell a violin from the sound. I am describing the size of the sound as it appeared to me.

THE COURT: No, no, not the size of [13-137] the sound. We are talking about

the size of the instrument from which you heard the sound coming.

THE WITNESS: The sound is as if the violin was two or three feet wide.

Q. What made it sound that way? That is what we can't get.

A. I don't know what made it sound that way.

Q. I mean, what was there about the sound that made you think the violin was wide?

A. The sound seemed to come from this wide an area.

Q. A single note came from that wide an area? A. Yes.

Q. Indicating with your hands about 18 inches apart, when you just held up your hands? Now, you have moved them way out.

A. I wasn't trying to show the size. I was just trying --

THE COURT: Let's go on.

Q. Can you draw for us in blue on this same chart where you thought the piano was located and its dimensions?

A. The piano was approximately almost the same, except that it went beyond the edges of the loudspeaker, somewhere between the edge and the very edge of the room.

[13-138] THE COURT: I notice you keep hovering in the back of the room, but hadn't you testified that you got the impression that the instrument was moving about the room?

THE WITNESS: No, no. I heard the instrument shifting across the wall.

Q. So you didn't hear the instrument wander around the room then?

A. You mean into the room?

Q. Yes.

A. No, I did not hear it wander into

the room.

THE COURT: At any time?

THE WITNESS: No, it did not at any time.

Q. You didn't hear it come out and wander about within the room that you were in?

A. No, I heard it wander about the room, confined on that wall.

Q. Indicating --

THE COURT: How far from the wall, an area how far from the wall?

THE WITNESS: Let me try to answer that. I would say the depth, if you are asking me the depth of the sound image, was about -- well, it seemed -- part of the sound seemed to emanate from behind the wall. In other words, I -- the way I [13-139] have drawn it. I did not hear the sound coming just from the surface of the wall.

THE COURT: How far?

THE WITNESS: It is very hard to say. I would say mentally my image was perceiving it as about three feet, four feet at the most.

THE COURT: Into the room?

THE WITNESS: Well, partly into the room and partly behind the wall.

THE COURT: But the part that seemed to come within the room was occupied in what area of the room; how far from the wall?

THE WITNESS: No more than three feet.

Q. (By Mr. Perry) Well, how far were the speakers from the wall?

A. Well, the apex here is a foot and a half; and then the front of the speaker is about 12 inches or so.

Q. The area that you have drawn within the room where you heard the

violin and piano was between the end wall and the speakers, right, and the back of the speakers, the V of the speakers, isn't that correct?

A. Well, it was not drawn to scale. I was asked how wide the image was. It varies from moment to moment, but it was behind the wall at some depth [13-140] which I didn't observe, and it was forward at some depth which I cannot --

THE COURT: You did. You said it was three feet or it was four feet. Now, which is it?

THE WITNESS: The worst it ever was, the maximum I ever heard was a total depth of about no more than four feet from the wall.

THE COURT: From behind the wall?

THE WITNESS: Part inside, part outside.

THE COURT: How much of it was within

the room or did it --

THE WITNESS: It is very hard to say how much is in the room. I am talking about maybe a couple of feet, maybe less at moments.

Q. Now did you --

THE COURT: How much longer are you going to go on this line? We have had questions along this line a great many times and for a long time. Like everything else, it must come to an end.

MR. PERRY: Unfortunately, we get a different story from each.

THE COURT: That is the best they can do.

MR. PERRY: I will offer this as the [13-141] next plaintiff's exhibit, your Honor.

THE COURT: Have it marked in evidence. Any objection?

MR. BEIL: No, your Honor.

THE COURT: All right. What exhibit?

MR. PERRY: I think it will be 34.

THE CLERK: Plaintiff's Exhibit No. 34.

(Plaintiff's Exhibit 34, chart drawn by Mr. Lefkow, marked in evidence.)

* * *

[13-142] MR. BEIL: Your Honor, one correction. I think that should be Plaintiff's Exhibit 35; 34 was Mr. Florman's drawing.

THE COURT: I have an Exhibit 34 already.

MR. BEIL: That was Mr. Florman's drawing.

MR. PERRY: I guess that is my error. This should be 35, your Honor.

THE COURT: Okay.

(Drawing by Mr. Lefkow, previously marked Plaintiff's Exhibit 34 in evidence, now marked Plaintiff's Exhibit 35 in evidence.)

* * *

[13-153] Q. You testified earlier that the Harman Kardon was not included in the special listening test done on January 23, 1970. Why is that?

A. That special listening test was for the Bose 901. I don't recall -- I don't recall anything specific about the Harman Kardon relative to that test.

* * *

[14-2] DAVID MARVIN GREEN, Sworn

Direct Examination by Mr. Beil

Q. Dr. Green, could you state for the record your name and address, please?

A. David M. Green. The address is 9 Lakeview Terrace, Winchester, Massachusetts.

* * *

[14-3] Q. Dr. Green, where are you currently employed? A. I work as a consultant for Bolt, Beranek & Newman. I also work as a professor of psychophysics at Harvard University. I'm Chairman of the Department of Psychology and Social Relations there.

Q. At Harvard? [14-4] A. At Harvard, yes.

Q. You say you are professor of psychophysics. What is that?

Q. Psychophysics is the study of the relationship between physical stimuli and

people's reactions to those stimuli, responses to such stimuli.

Q. Why is it in the psychology department? A. Well, psychology deals with people in general. An important part in the behavior of people is their reaction to physical stimuli. So actually psychophysics is one of the older parts of the field of psychology. It usually dates from Fechner --

THE COURT: Speak a little more slowly so there will be no question about the testimony being taken down accurately.

THE WITNESS: It dates from Fechner, about the middle of the last century.

Q. What's the relationship between psychoacoustics and psychophysics?

A. Psychoacoustics is a subbranch of psychophysics. It studies a reaction to sound; the physical stimulus involved in

sound, sound waves.

Q. Another way of defining psychophysics is what people hear and how they hear? [14-5] A. What people hear and the mechanism by which they hear it.

Q. What's the relationship between acoustics and psychoacoustics? A. Acoustics is the physics of sound, so it studies the sound wave and how it encounters objects and reflects and that sort of thing. It is a purely physical study and does not involve the human observer.

Q. Psychoacoustics? A. Psychoacoustics is acoustics as it relates to reactions of people hearing sound.

Q. Does psychoacoustics involve the study of both acoustics in physics and psychology? A. Yes, it is a discipline that lies on the border of those two

fields.

* * *

[14-7] Q. Could you now, Dr. Green, summarize briefly your educational background? A. I received a BA from the University of Chicago in 1952; a second BA from the University of Michigan in 1954; Masters from the same institution in '55; a Ph.D. from the University of Michigan also in 1958; then I have two honorary degrees from the University of Cambridge in Cambridge, England, and Harvard University.

THE COURT: You say 1958 for your Doctorate Degree, Ph.D?

THE WITNESS: That's correct.

THE COURT: '58.

MR. BEIL: Your Honor, if it would help I could give you the copy of Exhibit BU which I will ask to be put into evidence. The witness has a copy in

front of him, as do counsel for the plaintiff.

THE COURT: All right.

Q. The BA that you received from Chicago in 1952 -- [14-8] what was the field? A. Liberal Arts.

Q. And the BA from Michigan in '54 -- what was your field of study? A. Field of Psychology, as was the MA and Ph.D.

Q. They are all in Psychology? A. That's right.

Q. And did you do any work in psychoacoustics at Michigan? A. Yes, I conducted research in connection with obtaining my degree. I worked at what was then called the electronic defense group in the engineering department.

Q. Were your Masters thesis and Doctoral dissertation in the area of psychoacoustics? A. They were.

Q. After graduating from Michigan in 1958, could you please tell us now what jobs you took up to the present job?

A. My first was an assistant professor at the Massachusetts Institute of Technology from 1958 to '63. Then I went to the University of Pennsylvania, where I was an associate professor from 1963 to '66. From '66 to '73, I was at the University [14-9] of California, San Diego campus, and from 1973 until the present, I've been at Harvard University. Throughout that period, I've also been a consultant for Bolt, Beranek and Newman.

Q. Starting with your MIT experience, have you taught any courses in psychoacoustics or in physics?

A. In psychoacoustics, generally speaking, I've taught courses in perception at MIT and an introductory psychology course. I can't remember

others I've taught. Essentially the same sort of courses at the University of Pennsylvania and at the University of California; and I presently teach at Harvard a course called -- I think the name of it is Perception. I also teach the pro seminar for the incoming graduate students, professional seminar that is given to all the incoming graduate students.

Q. Does Perception involve hearing? A. Yes, I study both -- I teach both topics in vision and audition in the course of Perception.

Q. Does Harvard have a laboratory of psychoacoustics? A. Yes.

Q. Do you have any connection with that laboratory? A. Well, I guess I would be considered the director. It's a rather small lab, and a few graduate students, [14-10] myself, post-doctoral

Fellows.

Q. Are you a member of any professional societies? A. Yes, I'm a Fellow of the American Psychological Association, a Fellow of the Acoustical Society of America --

THE COURT: Perhaps you should have him specify which of these societies require examinations before admission.

MR. BEIL: All right.

Q. First, let's ask are you a Fellow of any societies? A. Yes, I'm a Fellow of the American Psychological Association, and the Acoustical Society of America and the American Association for the Advancement of Science.

Q. What does it mean to be a Fellow of those societies? A. Well, the procedures differ somewhat. I'm not very sure about the procedures for the latter; but for the first two, as I recall, you

have to be nominated by, I believe, it's a Fellow of the organization and then -- I can speak more directly about the Acoustical Society.

Q. Why don't you do that? A. There are two supporting letters that are required that go to the nomination committee. They make recommendation to the Acoustical Society of America. [14-11] Then if they approve it, a person is a Fellow.

Q. One can't apply to be a Fellow? It has to be selected? A. That's right.

Q. But a Fellow is a more honorary designation? A. Oh, yes. You can be a member of a society.

Q. Have you received any professional honors for your work in the area of psychoacoustics? A. In 1966, I received a Biennial Award of the Acoustical Society of America.

Q. What is that award given for? A. It's given every other year for an outstanding contribution by a person under 35, I believe, is the age limit.

Q. Anything else besides the Acoustical Society of America Biennial Award? A. I received a Guggenheim Fellowship in 1973 and was elected Overseas Fellow in Cambridge, University of Cambridge, England; and in 1978, I was elected to National Academy of Sciences.

Q. Would you tell us what is the National Academy of Sciences? A. It's a private organization that serves as advisory [14-12] and report-generating capacity for the United States government. It comprises about, I think, the membership is now about 1100 people.

Q. How old is the organization? A. I'm not absolutely sure. It's probably at least 200 years old.

Q. How does one become a member of the National Academy of Sciences? A. Well, again, I think you are initially nominated by someone in the Academy; and then there is a series of votes that are taken through the years, during the year, that pare the list down until, oh, usually about 20, 25 people are admitted each year.

Q. Is it fair to say that 1100 members of the National Academy of Sciences are considered to be the top scientists in the country? A. I suppose they think so. Occasionally we make some mistakes, but we tend to get people that are pretty good, yes.

* * *

[14-14] Q. How many psychoacousticians are members of the National Academy of Sciences? A. Psychoacousticians?

Q. Yes. A. Well, broadly defined,

it would probably be Dr. Neff, Indiana; Dr. Calambos, at the University of San Diego; Dr. Hirsch, Central Institute of the Deaf, St. Louis; and myself.

Q. How many psychologists are members of the National Academy? A. I think in the section I'm in, 25.

Q. Of all the academic psychologists in the country, there are only 25 people? A. That's right.

Q. Have you done any other professional work involved in professional publications or journals in the field of psychoacoustics, psychology? A. I'm not sure I understand the question.

Q. Well, have you served on any committees, been associated with any journals, or done any other similar work in the field of psychoacoustics? A. Associate editor of the Journal of the

Acoustical Society of America from 1970 to '73, and I'm consultant for a variety of psychological [14-15] publications.

Q. Have you done any work for the National Research Council? A. Yes.

Q. Could you tell us what the National Research Council is and what it does?

A. The National Research Council is an arm of the National Academy, and it appoints committees that consult and advise on various problems for sponsoring agencies; Army, Navy, Air Force, EPA; National Institute of Health; National Science Foundation; and the like. Transportation, Department of Transportation is another sponsor. They set up, in response to problems posed by these organiztaions, they set up committees that investigate the various -- try to make recommendations on

these problems. It's been a committee in existence for about 25 years, throughout during the war.

Q. Are you a member of any committees of the National Research Council?

A. I was a member of the Committee on Hearing Biological Acoustics and Biomechanics called CHABA. I was on the Executive Committee, two terms, '68 to '71 -- I was Chairman the last [14-16] year -- and it must be '76 to '79, and I was Chairman the last year of that term as well.

Q. Have you published in the field of psychoacoustics? A. Yes, that would be the majority of my publications.

Q. Do the publications listed on Defendant's Exhibit BU comprise all of your academic publications? A. I think so. I may have left out one or two.

I've never gone through it that carefully. I think I have most of them. I tried to put them down.

MR. BEIL: Your Honor, rather than go through the list, I would simply since the list is at least 87 publications, 87 articles and books and six letters to the editor, academic letters to the editor, I would simply like to have Defendant's Exhibit BU introduced in evidence as a list of Dr. Green's publications.

THE COURT: Any objection?

MR. PERRY: No, your Honor.

THE COURT: Admitted.

(Defendant's Exhibit BU, formerly marked for identification, admitted into evidence.)

Q. You published a text or textbook in the field of hearing or psychoacoustics? [14-17] A. Yes, I have. It's called An Introduction to Hearing.

Q. I am holding for you a copy of that? A. That's correct.

Q. Is this book listed in your vitae, which is Defendant's Exhibit BU? A. I hope so. Yes, it's number 66.

THE COURT: What's the title of it?

MR. BEIL: An Introduction to Hearing, by David M. Green.

THE COURT: Does that cover the psychological aspects of the sense of hearing?

THE WITNESS: Both physiological and psychological.

Q. Have you done any work, Dr. Green, in the field of design of loudspeakers? A. No, I have not.

Q. Have you conducted experiments using loudspeakers? A. On occasion.

Q. In the course of your work, have you conducted experiments on what people hear? A. Yes, that's mainly what I do.

Q. And of course, in some of those experiments you have used loudspeakers?

A. Yes.

* * *

[14-105] Q. When you say "back in that position," that is the one that is connected by the dotted line?

A. By the dotted line, and that speaker is not there. It is as if that speaker were there. So we can talk about reflection as generating virtual sources. What I want to do next is talk about the wall in back of the Bose speaker, and I'm going [14-106] draw speakers in back of that wall. They would be virtual sources from the viewpoint of the observer. Now, if I may continue, I'll label this. In my analysis, what is happening with the Bose speaker is that eight times as much energy is directed at the back of the speaker as at the front. By virtue of

that, the reflected energy is some almost eight times as great. That is, practically all of it comes off the back wall, 95 percent comes off the back wall. And the observer's faced with the situation in which -- let's see if I can draw what we use as a Bose speaker. This is the Bose speaker, and that is the observer. These reflected paths are in effect virtual sources here for loudspeakers that have considerably more volume than the direct path created by the Bose speaker in the center of the loudspeaker. There are also paths in this direction.

Q. That is reflected off of two walls?

A. Reflected off of two walls. These will arrive as reflected waves. This will in this case be a virtual source located back here. So the

observer in the situation faces a complicated situation in which there are many speakers. And the reason that these [14-107] multiple speakers are actually observed or play a role in localizing the sound is because the Bose speaker in effect violates the law of first wave form. This energy on this direct path is so small compared with the reflected energy that the observer is confused as to the locus of the speaker. He has to then make some compromise among these multiple reflected paths and determine something about the apparent locus of the speaker. Unless the two speakers are exactly the same, that is their frequency response of the loudspeaker, the polar radiation pattern of the speaker, the way in which it broadcasts sounds off the back and, indeed, the geometry of the room has to be -- if that is in any way

asymmetric, then the apparent locus of the source will depend upon the frequency. So as you play a passage of music, as the music changes in frequency, so will the apparent locus of the source. And in this situation, where you have violated the law of the first arrival, that is the first arrival is considerably down compared with the reflected energy that comes in later, you are liable to have ambiguity and uncertainty as to where the source is. And I would suggest that that [14-108] is the reason the subjects report a variety of things in listening to the Bose speaker. First of all, its image is large because the reflection can come from any place on the back wall. It's hard to say exactly where the source is located because it changes as the function of frequency, and all of this would lead to reports of a

widening image and a sound source that appears to move from one side to another.

Q. Would these effects occur with a conventional loudspeaker?

A. No, the conventional loudspeaker is designed to avoid this problem. The direct path is the only path. That is, the direct path is by far the strongest path. Usually, there are reflections, but there are seldom many. It would be a very rare event for the reflected paths in the conventional speaker to be louder than the direct path. The direct path is the first arriving wave form. It is the loudest wave form and, therefore, localized very precisely. Any asymmetries in a conventional speaker does not affect -- well, it will tend to affect when these direct paths arrive, but they will -- in a conventional speaker, you'll still [14-109] resolve

the source as something in the middle of an array. With the Bose, any asymmetries will change the locus of the secondary echoes, which are much larger than the primary or direct path; and they will change with frequency due to these asymmetries that I have listed.

Q. Could you list the asymmetries for us?

A. The difference in the frequency response of the speaker. Now, that, of course, would -- I'll let it go at that. The differences in the pattern of sound radiation, the polar plots of the speakers, the differences in the geometry of the room, the asymmetries in the room would cause some of these reflections to be larger than others, and for them to be frequency dependent.

Q. Would you expect these asymmetries to be present in a typical

listening room? A. Yes, unless the listening room were extremely symmetric, it would be very rare indeed for the listening room not to be somewhat asymmetric.

Q. Would it -- what effect would it have if the source being played through the Bose 901 speakers were from a monaural record as opposed to a stereo record?

[14-110] A. It might change it to some degree, but the same factors, the very broad image, would be present with a monaural record or a stereo record, or there might be a little more motion with a stereo record. But there would certainly be a lot of motion with the monaural record. And I have listened to monaural records through the Bose, and it's still a wide image and difficult to localize exactly where the sound is.

Q. You have listened to the stereo record? A. Yes.

Q. And what have you heard? A. I have heard things that I would describe as, first of all, as very broad image. There is no question about that. Secondly, the source is hard to localize. It's vague, and from moment to moment changes its location. So you might, especially on solo instruments, the apparent source moves from time to time. It could be located in any number of places in front of you.

Q. Is there any support in the literature for the analysis you have drawn today?

A. Yes. After making this analysis, I then consulted the literature, several journals in the field, and tried to see if anyone else had described loudspeakers [14-111] in this way or described any of

the phenomenon I have reported in this way. And if I may, I could cite some of those references, if you'd like.

* * *

[14-113] Q. Are there any sections of Mr. Bauer's article that you [14-114] wish to refer to specifically?

A. Yes, on the first page, second column, about half-way down, the sentence,

> "As the observer moves from the center, the image will undergo a very rapid motion in the same direction."

And then further down the page,

> "A listener at a live orchestral performance perceives sounds from the instrumental groups directly, which helps to localize the sources of sound. Shortly thereafter he receives the reflected sounds from the ceiling, walls, et cetera, which account for the feeling of being in a large hall."

So again, I point to the importance of the arrival of the first wave form as

localizing the sound, whereas the second or reflecting sound in a conventional situation simply adds quality to that perception. The important point is that the first wave form, if it is indeed as large or larger than the reflections serves to pinpoint the locus of the source.

[14-115] Q. Does that happen with the Bose 901? A. In the Bose, I would argue that the reflected sound is more powerful than the direct sound, and this leads to these anomalies in localization which most observers report.

* * *

[14-123] Q. And in addition to what you have testified to so far concerning your review of the literature and your analysis; is there anything else you have done or caused to be done which forms the basis of your opinion? A. Very much so.

Q. Would you please tell us what that is? A. I set up a listening experiment in which I had subjects compare conventional loudspeaker systems and a Bose 701.

Q. 901? A. I'm sorry, 901. In a small conference room at Bolt, Beranek and Newman, the speakers were both driven by the same electronic equipment, and the passage played was a flute record. The situation was arranged so that we could switch between the conventional systems and the Bose 901. I had the subjects come in and listen for four minutes during which time we alternately presented one or the other systems back and forth for about 30 seconds. This was in -- this was designed to insure them to have some general impression as to how the two systems sounded. And there was a one-minute presentation of one of the

systems, and the subject was at the end of that one minute of listening, was asked to [14-124] judge the spatial extent of the speaker and was asked to mark on a drawing of the experimental room where he thought that speaker was located, as to the special instructions that --

* * *

[14-130] THE WITNESS: Can I continue? They are seated in front of a -- I can't think of the word -- a curtain, burlap curtain.

THE COURT: A screen?

THE WITNESS: Yes, so that they [14-131] can't see the speakers. And we asked them to make a drawing to indicate the size of that image on a drawing of the curtain, after the experiment is done, and then to indicate the area of that image in square meters. So they

give a numerical estimate, and they also make a drawing, and we have scored both of these responses in the course of this experiment.

Q. I refer your attention to the last page of Exhibit CB; would you tell us what that is and what the people who participated in this listening test were supposed to do with regard to that page?

A. That is a sketch of the front wall elevation which is primarily that burlap screen, and that is a post over on the right. That is the one line on the right, and that is a front wall elevation, and then there is also a plan view of the scene looking down on the room, and the position of the two subjects that ran in, that were involved in the experiment at any one time is indicated by the desk and the chair where the subject sat in approximately the

middle of the room, midway between the speakers.

Q. What were the participants supposed to do with respect to this drawing?

A. Well, at the conclusion of the first minute segment [14-132] with one of the speaker systems being played, they were to indicate numerically how large the image source was in square meters, and to draw it on the front elevation and to sketch its depth on the plan view. Then for the next -- then the next minute, they heard the other system and were required to make the same judgment of the other system. So we were comparing the two systems. Sometimes they were run in one order; sometimes in another.

THE COURT: Aren't the limits or the boundaries of this so-called image rather

vague and impossible of exact determination?

THE WITNESS: That was the complaint of many of the subjects, that some of the images were very difficult, too.

THE COURT: Are there any images when you speak of sound as an image? Can there be any image which has an exact contour?

THE WITNESS: They drew these contours on the page for me.

THE COURT: I know they drew it, but how can you conceive of a definite boundary of such an image in space? Certainly the sound itself doesn't have a short little pattern around it.

[14-133] THE WITNESS: No, there would be borders, and I think I can get your Honor's puzzlement if we can get to the data. I think what that will do is some subjects will take a very restrictive

definition of what they mean by shape and therefore they'll tend to draw very small pictures. Others will take a more liberal definition and therefore draw very large pictures.

THE COURT: That being the case, how can you know whether or not you are giving an exact data?

THE WITNESS: Well, your Honor, the purpose is to compare these two systems. And you see, if the person who has a very restrictive definition draws a very small image for one and a larger image for the second one, and the other person who has a very liberal image and draws a picture this size for the first and that for the second; in both cases, I'm safe in concluding that the second system appears bigger than the first system. That is the purpose of the experiment. I want to determine in a few days exactly what the

subject means when he talks about a sonic image or the extent of a sonic image. What I'm trying to do is compare two systems, and [14-134] see if one is reliably larger than the other in their apparent sonic image.

Q. Where did this experiment take place? A. Bolt, Beranek and Newman, in a conference room on the third floor of the new building. I should point out, I haven't concluded the experimental manipulations.

Q. Why don't you continue with that?

A. There were two other parts of the experiment. Another two minutes of sound were played. In these, I asked the subjects to indicate the extent of the motion of the image. Next, the judgment -- once the judgments of extent are completed we will next judge whether or not the apparent sound source changes

location and if so by how much. They hear a one minute musical passage. During that minute they listen carefully and note the apparent position of the sound image. Once again they project the image on the front wall, connect the centers of the two most distant locations and estimate the length, in meters, on a line connecting these two points. To help them make an accurate judgment of length, we placed a white string one meter long in front of them on the curtain. And then they're asked, of [14-135] course, to draw the approximate locations so that we can inspect where the image appeared to be and correlate the drawing with the judged extent -- judged motion.

Q. How long was the segment of music that they listened to?

A. One minute, and they listened

again to one of the systems and made the judgment. Then they listened another minute and made the judgment for the second, and that concluded it. So that they made a judgment of extent and made a judgment of motion for the two systems, the Bose 901 and the conventional system.

* * *

[14-136] Q. How many subjects were involved? A. We ran eight subjects each day, 16 subjects total.

Q. Did you design this experiment? A. Oh, I guess you could say that. Yes.

Q. Who conducted it? A. The subjects were actually run by Dr. Sheldon, who was the postdoctoral fellow who is working in my lab. I was the -- well, I helped set it up and went [14-137] through a dry run with him and then was present for a couple of tests, but not for the entire duration.

* * *

[14-138] Q. Did you give an instruction to Mr. Sheldon as to whether the listeners were to be allowed to see the speakers or not?

A. Certainly, that was part of the purpose of the experiment there was to conceal the speakers from the subjects so that the lights were not turned on in back of the curtain. I instructed Dr. Sheldon not to turn the lights on in back of the curtain. That is what I know.

Q. Now, where did the subjects come from? A. They were volunteers that we had.

Q. Were any of them employees of Consumers Union or Bose Corporation?

[14-139] A. No.

* * *

[14-145] THE COURT: Who participated in this experiment?

THE WITNESS: Volunteers at Bolt, Beranek and Newman.

THE COURT: Who were they? Do you know who they were? How many were there and who were they?

THE WITNESS: Sixteen, and they were all employees of BB&N. I can name some of the names. I doubt if I could generate all 16.

THE COURT: Did you take steps to have them identified?

THE WITNESS: Yes, I know who they all are.

* * *

[15-32] Q. Could you tell us what Page 2 [of Ex. CF] represents and how it should be interpreted?

A. You will recall in the experiment, the second judgment [15-33] given by the subject was the extent of movement of the source. Again, source,

system A and system B were played, and the subject judged the extent that the instruments seemed to move around during the passage that they listened to.

THE COURT: With reference to some specific point in the room or what?

THE WITNESS: No, they were asked to try to figure out where the flute was as the passage began; and if it moved at all, to note how it moved and then finally judge the farthest two points that the flute ever occupied during the one-minute passage. The judgment was made in meters. The values indicated opposite the entries, S-1 under systems, System A and System B, are the extent of that judgment in meters. So the first subject, for example, said System A moved during this minute a half meter. He said System B moved one meter. Again, as with previous comparison, I would urge you to

look at the ratio of the judgments. If the judged movement is greater for System B than A, we put a plus sign in the last column. If it's the opposite, we put a minus sign. There is [15-34] no sign indicated for Subject 12 because he didn't believe that either system moved. The test was constructed so that that was an allowable response, and that subject made that response. Many subjects, for example, Subject 3, Subject 7, Subject 12 -- I'm sorry -- Subject 15 said that the conventional system did not move at all, but the Bose system moved a certain amount; 1.7, 3, and 1 meters. Again, we can consider whether or not the subjects are able to make this judgment reliably by asking whether the ratio predominantly in one direction or another -- again, it is 13 positive, two negative, one tie, we don't count. It probably in this case of

that result arising by chance alone is five parts in a thousand. If you look under the regression column, again, you see the movement is about 2.48, 2.5. The ratio is about 2.5 between the two systems; that is, the Bose system appears to move more than a conventional system. The flute, when listened to through the Bose system, appears to move more than under a conventional system. That's all I wish to say in summary of that.

* * *

[15-37] Q. Turn now to the last page of this document, if you would.

A. Again, after the movement judgment, the extent of movement judgment had been made, the subjects drew dots or small circles on the page indicating where the instruments had seemed to be in the course of this one-minute passage, and we simply took a ruler out and drew a

line connecting the furthest points and estimated, therefore, from their drawings the extent of the movement; and those numbers are represented in this page so that, for example, Subject 1 the apparent motion inferred from a measurement with a ruler on his drawing was about .77 meters. [15-38] Again, the pattern of results is similar to what we have seen before. In this case there are 13 instances in which the subject judged the Bose to move -- drew pictures in which the Bose appeared to move further than the conventional Altec system. In one case, the reverse occurred. The probability associated with this ratio is 2 parts in a thousand. If these systems were judged to be equal in the extent of motion, the chances of this particular configuration of results happening would be 2 parts in a thousand. Again, the

regression analysis shows that the motion of the Bose as inferred from these drawings is about two times what the motion of the conventional system as inferred from the same drawings, the drawings for the conventional system.

Q. Can you draw, or did you draw, any overall conclusions from the data that you accumulated during this experiment?

A. I think the experiment demonstrated what I had observed personally; namely that the size of the acoustic image produced by the Bose system is considerably larger than that produced by the conventional system. The positions of the [15-39] instruments and their apparent motion is also greater for the Bose than for a conventional system, and this ratio runs between two and three, depending upon subjects. Not all

subjects see it this way, but the overwhelming majority --

Q. Okay. A. I should say, hear it, rather than see it. Hear it this way.

* * *

Q. Your testimony today, Dr. Green, is a continuation of your testimony yesterday as to what the bases of your opinion are. Did your personal observations form part of the basis of your opinion?

A. Yes, my personal observations formed part of the basis of my opinion. [15-40] The analysis of the relevant scientific literature was the other basis for my opinion, and the results of this experiment all support two essential features, I think, in summary. One is that the image is larger with the Bose than with conventional systems and that the locus of the image is somewhat -- I

would describe it as more unstable. It appears to move from time to time more than does the same acoustic image that is heard through a conventional speaker.

Q. Could you tell us, describe what personal listening you did to the Bose 901.

A. It's described somewhat in the letter that I wrote, but I spent approximately six to 10 hours, I would estimate, over a period of a couple of weeks listening to the system. I played a variety of different kinds of music, singing, human voice, harpsichord music, piano music; and in all cases, -- some recordings of calliope. In all cases, it seemed that the same conclusions, general conclusions, could be drawn. Some pieces of music exemplified [15-41] what I've stated more than others; but in all cases, the image was larger, the image

was less stable and appeared to move from time to time.

Q. By the way, did Consumers Union tell you how to design or conduct this experiment that you have described for us today? A. No.

Q. Who designed it? A. I designed it.

Q. Did Consumers Union tell you which music to use? A. No, I selected that passage myself.

* * *

[15-56] Q. Dr. Green, what phrase or term is used in the term of psychophysics, psychoacoustics, to refer to the nature or the dimensions of sound produced by a sound-producing object or instrument?

A. The apparent size of the source.

Q. All right. Based upon your knowledge of psychoacoustics,

psychophysics, based upon your personal observations of the Bose 901 and of the tests and experiment that you conducted and described for us, were you able to form an opinion concerning the [15-57] apparent size of the source of the sound produced by the Bose 901 loudspeaker system?

A. Yes, I was.

Q. Could you tell us what that opinion was?

THE COURT: What's the answer?

THE WITNESS: Yes, I was.

* * *

[15-59] Q. Could you please now answer the question.

A. "In comparing the Bose 901 with a conventional loudspeaker system, I observed that the conventional system provides a more restricted sound image than the Bose and one in which the

individual instruments tend to stay in the same location. The Bose 901 system produced a much wider and more diffuse sound image. On some solo passages played through the Bose 901, the location of the musical instruments is very indistinct and [15-60] may be localized in different places in the listening room at different times." Let me add to that, since the term "sound image" appears in that passage I would, in view of the discussion we have had on it and the fact that it is not precisely defined, I would substitute -- well, let me put it this way. I mean by sound image --

THE COURT: So as to shorten this thing and retain the accuracy that you are striving for, why don't you make the changes you think you should make and read it as changed.

THE WITNESS: Thank you, your Honor.

(Pause.)

THE WITNESS: I think I'm ready, your Honor.

THE COURT: Ready? All right.

THE WITNESS: "In comparing the Bose 901 with a conventional loudspeaker system, I observed that the conventional system produced an acoustic image of smaller apparent size than the Bose and one in which the location of the individual instruments tended to stay in the same location" -- I beg your pardon -- "tended to stay in the same location. The Bose 901 system produced an image [15-61] of much wider and more diffuse apparent size. On solo passages played through the Bose 901, the locations of the musical instrument is very indistinct and may be localized in different places in the listening room at different times."

* * *

Q. Were you also able to form an opinion concerning the apparent movement of the source of sound produced by the Bose 901 loudspeaker system?

A. I take statements about the movement to indicate the change in location as a function of time, and the statement indicates that there are these changes of location. [15-62] The phrase "movement" to me -- I find a little difficulty interpreting statements of motion in the following sense: I don't appreciate the solo instrument, for example, the flute or violin, as being united in one place and then slowly progressing over to another place. Rather, I find the image of the instrument to be fleeting and first in one place and then in another.

THE COURT: To be what?

THE WITNESS: Fleeting.

THE COURT: Fleeting?

THE WITNESS: First in one place, then in another. So that as I say, the apparent locus of the instrument changes from time to time.

* * *

[15-74] Q. Dr. Green, do you have an opinion concerning whether the location of individual instruments when played through the Bose 901 loudspeaker system appear to change or to move? A. I do.

Q. Could you tell us what your opinion is and what that opinion is based upon?

A. The location of any instrument played through the Bose, as the range of music changes, that is the frequency composition of the passage changes, appears to occupy different points at different times. The image is somewhat

indistinct and those two may be related in some way, but the actual location, for example, of the flute or the violin seems to move or occupy different positions at different times. And the basis of that opinion is my own listening, the subjects -- reports from [15-75] the subjects that ran in the experiment, and I find it consistent with the physical analysis of the Bose 901 that I gave yesterday.

* * *

[15-76] Q. Dr. Green, if you draw a line between the speakers, with respect to that plane on which the speakers are, do you have an opinion whether there is any -- whether this movement is either forward or back of this line? A. Yes.

Q. What is your opinion?

A. There is an apparent change in the distance from the observer to, say, the plane running through the two

speakers, and that changes at different times as [15-77] well. Sometimes the instruments would seem behind the wall of the listening room, sometimes in front of the listening room. To my own ear, that change was not very marked, and it was confined roughly to this area that Mr. Seligson has testified about and Mr. Lefkow. But our subjects report considerable changes in depth.

Q. Were there any such reports during your experiment?

A. I think you will find one of the subjects in the experiment drew a picture in which the -- if we look down on the room from above, it is at least behind the curtain and well out into the side of the room, but his or her ear -- I'm not sure of the sex of the subject.

* * *

[16-22] Continued Cross-examination by Mr. Perry

* * *

[16-96] Q. When you were playing the Bose 901 on March 14, did you ever have the impression that musical instruments were growing to gigantic proportions and coming out and wandering about the room?

A. I wouldn't use that language.

* * *

[16-129] Now, you told us at the end of the day yesterday, Dr. Green, that the subjects who were tested on March 18 and 19 reported perceiving a movement of the sound source in the case of both the Altec conventional speaker and the Bose 901 speaker; that is correct, isn't it?

A. That is correct.

[16-130] Q. And you said that you expected that, right? A. I did.

Q. Why? A. Well, the material they

were listening to was a stereo recording; and in the course of any, practically any stereo recording, there will be a loudness change in the two speakers. Therefore, the image will shift back and forth between the two speakers; not to the speakers, but in the direction of the loudspeaker in the course of the passage.

Q. That happens with conventional speakers as well as speakers like the Bose 901, doesn't it?

A. That's true. One of the quotes I read into the record, the first part of my testimony, in fact, commented on that same problem with conventional speakers.

Q. So a certain amount of movement or apparent movement of the sound source in the plane of the speakers is to be expected, whether the speakers are conventional or Bose 901s, correct?

A. That is correct. Not everyone

hears it. Some of my subjects said no movement. But I would say on average, that's the case.

Q. Would you agree that the average person hearing that [16-131] apparent movement does not form a mental impression that the instrument being played is moving about?

A. My data seemed to indicate that he does.

* * *

[16-134] Q. No. Neither would anybody else of normal hearing, would he?

A. Well, there is a great range of descriptors that people use in describing these experiences, and I wouldn't use the term "an instrument moves about;" but I would not be surprised if somebody else would. Nor would I expect them to really think that an actual instrument is moving about or something. It would be simply

as a descriptive phrase for the apparent movement of the instrument being played.

* * *

[16-151] THE COURT: Let's make sure. Show it to him. It's 11.

THE WITNESS: Well, I would interpret the maximum motion, which was part of the instructions, to be from this point, that is, a point behind her head, almost directly behind her head, to the left-hand corner of the room; that is, that the maximum motion was a motion was a motion in depth of approximately 13 meters. Then we asked if it ever arrived at any other place, indicate that on the drawing. She apparently did so. If we project across the front of the wall, you get a lateral motion of about five or six meters.

* * *

[16-178] Q. All right. Turning to

Page 1, second paragraph of your letter, the last sentence says: "I have also relevant technical literature in this field." What did you mean by the words "this field"?

A. I'm sorry. I lost the page.

Q. The first page, second paragraph, the last sentence. What did you mean by "this field"?

A. Binaural hearing, localization, lateralization.

Q. And did you in fact make an extensive examination of scientific literature in that field? A. I did.

Q. Are you aware of any publication in the scientific [16-179] literature -- I don't mean popular magazines, but the scientific literature -- that describes the phenomenon of a loudspeaker causing a musical instrument to appear to have greater dimensions than the dimensions of

the actual instrument? If you want that read back, perhaps we should.

(Question read back by the reporter.)

MR. BEIL: We want to first establish what you mean by scientific and popular literature.

THE COURT: I think it's clear enough. Do you understand the question?

THE WITNESS: I believe so.

THE COURT: Is there any word in it which is not clear to you?

THE WITNESS: Could you read it back one more time?

(Question read back by the reporter.)

THE WITNESS: I could not cite such reference. I don't know of any.

Q. Are you aware of any description in the published scientific literature of the phenomenon of a loudspeaker causing a musical instrument to appear to move away

from the location of the loudspeaker and to wander about the interior of the room in which the loudspeaker [16-180] was played?

A. Again, the language is critical, so could you read it back?

(Question read back by the reporter.)

THE WITNESS: I'd have to consult some of the quotes that I read in the record earlier. They would be in my other book, if I can refresh my recollection. I'm not sure whether they contain such descriptions or not. This is not a sort of description that would appear in scientific literature.

Q. Assuming that those quotes do not contain such a description, what would your answer be?

MR. BEIL: Your Honor, that assumes -- I don't know if it's warranted or not.

MR. PERRY: I know there is no such description in any of the scientific literature in the quotes he's read to us.

THE COURT: What's wrong with the question?

MR. BEIL: He is making an assumption that is based entirely on Mr. Perry's --

THE COURT: Read the question.

(Question read back by the reporter.)

MR. BEIL: Assuming that those [16-181] articles do not contain such quotes.

THE COURT: Then you make such an assumption.

THE WITNESS: Do you want my answer if I --

THE COURT: Can you make such an assumption? Is it too difficult?

THE WITNESS: I think I understand the question. If I assume that those

quotes do not say that, then I know of no other quotes that would say that.

* * *

[18-25] Q. I think you testified last Friday, Doctor, that you would [18-26] not use the language, "instruments appeared to grow to gigantic proportions and tended to wander about the room," to describe anything which you have heard personally in listening to the Bose 901 loudspeakers, is that correct?

A. That is correct. I would not use that language.

Q. And you testified, if I recall correctly, that you thought a layman might use such language?

A. I can -- it's perfectly conceivable that given a situation where the image is somewhat diffuse that that could be described that way.

Q. In fact, to quote you exactly, at

Page 17-64, you said: "I can well imagine some ordinary person, layman, a subject being confused about it and discerning it as if the instrument itself had grown." Do you remember that?

A. I think I would agree with that, at least use those words.

Q. When you used the term: "layman," did you mean someone who was inexperienced and unsophisticated in the testing and evaluation of loudspeakers? A. Yes.

Q. Dr. Green, if a person had a degree in electrical engineering and had taken postgraduate courses in acoustics and engineering, working towards a masters [18-27] degree, and had worked for more than 15 years in the testing and evaluation of loudspeakers and other audio products, and was in charge of testing loudspeakers for a national

consumer product testing organization, and was able to design and conduct and supervise tests to evaluate loudspeakers, and himself had invented a loudspeaker on which he had received a patent, would you consider such a person to be a "layman," within your meaning of the word?

A. No, sir.

* * *

[18-29] Q. While you were listening to the Bose 901 loudspeaker, did you perceive at any time that an instrument seemed to move out away from the plane of the loudspeakers and into the room?

A. No, sir.

Q. How many hours did you spend listening to the Bose 901 system?

A. Approximately, oh, approximately 16 to 24 hours, somewhere [18-30] in that range.

Q. Prior to the time you were

contacted about being an expert witness in this case, on February 15 of 1980, had you ever listened to Bose 901 loudspeakers? A. Yes, sir.

Q. Under what circumstances?

A. My memory is not very clear, but it must have been about the time the speakers were produced, I heard them played in a hi-fi store in Pacific Beach in California.

Q. For how long a period? How long did you listen to them? A. Fifteen minutes, perhaps, half an hour.

* * *

[18-33] Q. Let me ask, Dr. Green, as you listened to the Bose 901 loudspeakers in preparation for testifying here, did you sometimes think that notes from the same instrument came from different directions as the frequency of the notes changed?

A. That was my impression, yes.

Q. And you would expect that to happen with conventional speakers as well as Bose 901 speakers, wouldn't you?

A. Conventional speakers pointed at the wall or facing --

Q. No, the conventional speakers with the drivers on the front, pointing toward the listener?

A. No, I don't think I would.

Q. Let me call your attention, Doctor, to a portion of your testimony on the 15th day of trial, at Page 15-147, the last question and answer on the page. If you would read that to yourself. You testified there, didn't you, that with conventional speakers, you would expect some movement [18-34] of the apparent location of the sound source.

MR. BEIL: The testimony stands for what it says. The question you're asking

today is slightly different.

Q. Well, I'll take it a step at a time. With conventional loudspeakers, that is, having the drivers only on the front, and pointed toward the listener, not toward the wall, you would expect, as you listened to notes of different frequency, that the direction from which a particular note came might change with frequency, isn't that true?

A. Is this a single speaker or a stereo, a pair of speakers?

Q. A pair of speakers. A. A pair of speakers?

Q. Yes. A. Well, on a pair of speakers, the image might shift a little between the two, even with conventional speakers.

Q. As the frequency changed, right? A. It could, or it could be in the program material itself, that there were

just, the sound is louder on the right than on the left at some particular passages.

[18-35] Q. All right. In either case, you would expect some apparent movement of the location of the direction from which a particular note came, either as the intensity of the music changed between the left and right speakers or as the frequency of the note changed, is that correct?

A. That is correct.

Q. Both with the 901 and with the conventional speaker, right? A. With both systems, yes.

Q. I may have asked you this, and if I'm repeating myself, I apologize but while you were listening to the 901 speakers, you never got the impression of the speaker coming out from the area of the plane and coming in toward you, did

you?

A. My listening, no.

* * *

[18-94] REDIRECT EXAMINATION by Mr. Beil

* * *

[18-108] Q. (By Mr. Beil) Dr. Green, you have listened to the Bose 901 loudspeaker and you have conducted tests upon it. What, in your view, is the most noticeable difference between the sound of solo instruments when played through the Bose 901 compared with the solo instruments being played through a conventional speaker system?

A. The most salient characteristics, in my opinion, ones that would be noted especially in a comparison between the conventional and the Bose, is the size of the acoustical image, where the sound appears to come from, in the two situations; and whether the stability of

the image, as to whether it stays in one place or appears to move about, comes from different [18-109] places at different times.

* * *

[18-111] THE COURT: What is meant by the size of an acoustic image?

THE WITNESS: Well, it's essentially in a report by the subject of what the subject believes the area of the object making the sound is, the extent of the object.

THE COURT: Well, the object that makes the sound, in the case where we have a loudspeaker, is a loudspeaker.

THE WITNESS: That's correct.

THE COURT: Well, the size of that loudspeaker is ascertainable by looking at it.

[18-112] THE WITNESS: That's correct. But you will recall that if we have --

THE COURT: I'm talking about acoustic image.

THE WITNESS: Yes, but you recall that in the Gardner article, it described the situation where you have two loudspeakers at about 45 degrees with respect to the listener, and the subjects will report that the sound appears to come from an area in front of them and that area has some extent.

THE COURT: That I understand. The area from which the sound seems to emanate is susceptible of some estimate, that's true. But is that synonymous with image?

THE WITNESS: That's the way I use the words "apparent acoustic image." If you ask the subject to draw how large the sound is, I would take that drawing --

THE COURT: Meaning the area of what?

THE WITNESS: The area as he drew it

on the paper. I could translate it into the room if I know the dimensions of the screen or the curtain he was looking at.

THE COURT: What is he supposed to visualize in his mind, for this sound image; sort of [18-113] a mass, a shapeless mass?

THE WITNESS: I think that's about as best as I can describe it to you, yes.

THE COURT: So I wasn't too far wrong in thinking that was what you talked about?

THE WITNESS: That is what is being talked about.

THE COURT: That is very vague, isn't it?

THE WITNESS: Yes. It's difficult to get precise definitions and concepts in this area.

* * *

[18-116] Q. Is the language quoted to

you by Judge Julian, instruments appearing to be of gigantic proportions and tending to wander about the room, within the range of responses reported to you by the experiments, by the subjects in your experiments?

[18-117] Q. Is the language quoted to you by Judge Julian, in your view, misleading or inaccurate?

A. I wouldn't say so, no.

Q. Why not?

A. Well, one accepts a considerable variability in the way people describe these situations. They are not concrete and very definite. There is a degree of vagueness in your characterization; and I would -- well when they draw pictures where the source comes out of the room and is in back of them in the course of listening to the passages, I would say that indicates a great deal of movement.

Whether you want to call it wandering or not, I prefer not to try to settle that issue. But they certainly show a lot of movement and a great deal of size. One of the subjects, for example, drew essentially the entire curtain in front of her, 13 square meters, as being the apparent source of the sound when listening to the Bose 901. Now, that is not the size of the flute. It couldn't be the size of a flute under any stretch of the imagination. So it would -- it's an unusual experience, and how they care to describe those [18-118] unusual experiences, I really can't control and I don't try to. I just listen to their descriptions and try to interpret what they are saying in terms of the physical stimulus.

* * * *

[18-125] You testified on cross that you

listened to the speakers in California when they first came out, the Bose 901 speakers. Could you tell us what you heard at that time?

A. Well, I heard them in a relatively small room. I wouldn't want to judge the dimensions but, perhaps, oh, 10 by 12; and it was apparent that they did generate a very large acoustic image. [18-126] The sound came from all over, including from behind my head, at times. It was a very lively room, a lot of reflections in it.

Q. You heard this before you were contacted to be a possible witness in this case?

A. Oh, I can't recall the exact date, but I would guess -- it was more than seven years ago when I first heard it.

* * *

[19-68] AMAR BOSE RECALLED

Direct Examination by Mr. Perry

* * *

[19-130] Q. (By Mr. Perry) One final matter, Dr. Bose. How many pairs of Bose 901 loudspeakers has your company sold up to the present time?

A. I checked last week, and it was 234,700-and some. I don't remember the 10s digit on that.

Q. Something over 234,000 pairs? A. Correct.

THE COURT: Pairs?

THE WITNESS: Pairs, yes, your Honor.

Q. Were they all --

THE COURT: That's Bose 901s?

THE WITNESS: That's correct.

Q. Were they all of the design that had four drivers on each of the two rear panels and a single driver on the front panel? A. Yes.

THE COURT: In other words, in every way the model was identical with the model in evidence here now?

THE WITNESS: No, your Honor.

Q. But as far as the design --

[19-131] THE COURT: But it was a 901?

MR. BEIL: 901 Series 1, 2, 3, and 4, your Honor.

THE COURT: What series are you talking about? You have said since when was this --

THE WITNESS: I checked last week, your Honor.

THE COURT: From what date to what date?

THE WITNESS: Late '67 or early '68, when the 901 model first came on the market, until last week. Mr. Perry asked me how many of the model 901 were sold.

THE COURT: Without specifying the series?

MR. PERRY: That's correct, your Honor.

Q. This would include Series 1, 2, 3, and 4? A. Yes, it would.

Q. But no matter what the series number, would they all have the same basic design of four drivers on one rear panel and four drivers on another rear panel and a single driver on the front? A. Yes.

THE COURT: How many 901s first series were sold, do you know?

THE WITNESS: I don't know at this point, your Honor.

* * *

[19-135] Cross-examination by Mr. Beil

* * *

[19-153] Q. All right. If the direct paths were blocked by some means, either a person or a wall or something so it blocked the entire direct path, how would

the listener perceive the sound in that situation?

A. I don't know how to answer that because there are no words to describe all the aesthetic aspects of sound.

* * *

NOTATION OF PLAINTIFF'S
EXHIBITS 2, 7 AND 10

Ten copies of Plaintiff's Exhibit 2 (the May, 1970, issue of Consumer Reports) have been deposited with the Clerk of the Court for the use of the Justices.

Plaintiff's Exhibit 7 was a copy of the article entitled "Loudspeakers" which appears at pages 272-278 of Plaintiff's Exhibit 2.

Relevant portions of Plaintiff's Exhibit 10 (Seligson's draft report to Editorial) are set forth in footnote 15 of the liability opinion of the District Court at App. X153-X157.

PLAINTIFF'S EXHIBIT 9
(excerpt)

Personal Observation on Bose 901
upon listening for several hours

Appears to have exaggerated mid bass. Not particularly objectionable but noticeable. Piano music is unusually spread. Piano is wall to wall. Violin is also widened (Menuhin-Shanker) and appreciable moves across room. Violin not as wide as piano. Seems effect is strongest on 'centered' sounds. Try mono records.

Eureka! Mono is 'vastened' - all space noted for stereo also noted for mono. Broadening effects also noted.

1/23/70 ALS

Lower midrange or upper bass sounds boosted, adding a "tiring", annoying quality to the sound. Sound spread out over entire wall. Stereo effects seem

diffused; trouble in pinpointing location of soloists, especially voices. Violinist (soloist) shifted position depending on scale he was playing (different notes came from different directions. Monophonic material sounded almost like stereo. Treble range had very smooth & pleasing quality. If it weren't for upper bass emphasis, would have tone quality on par with best in project.

AL 1/23/70

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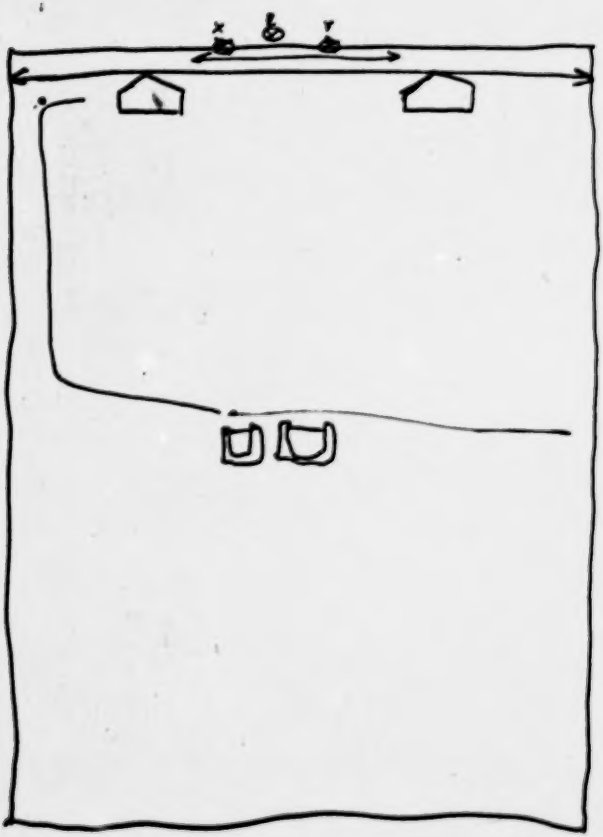
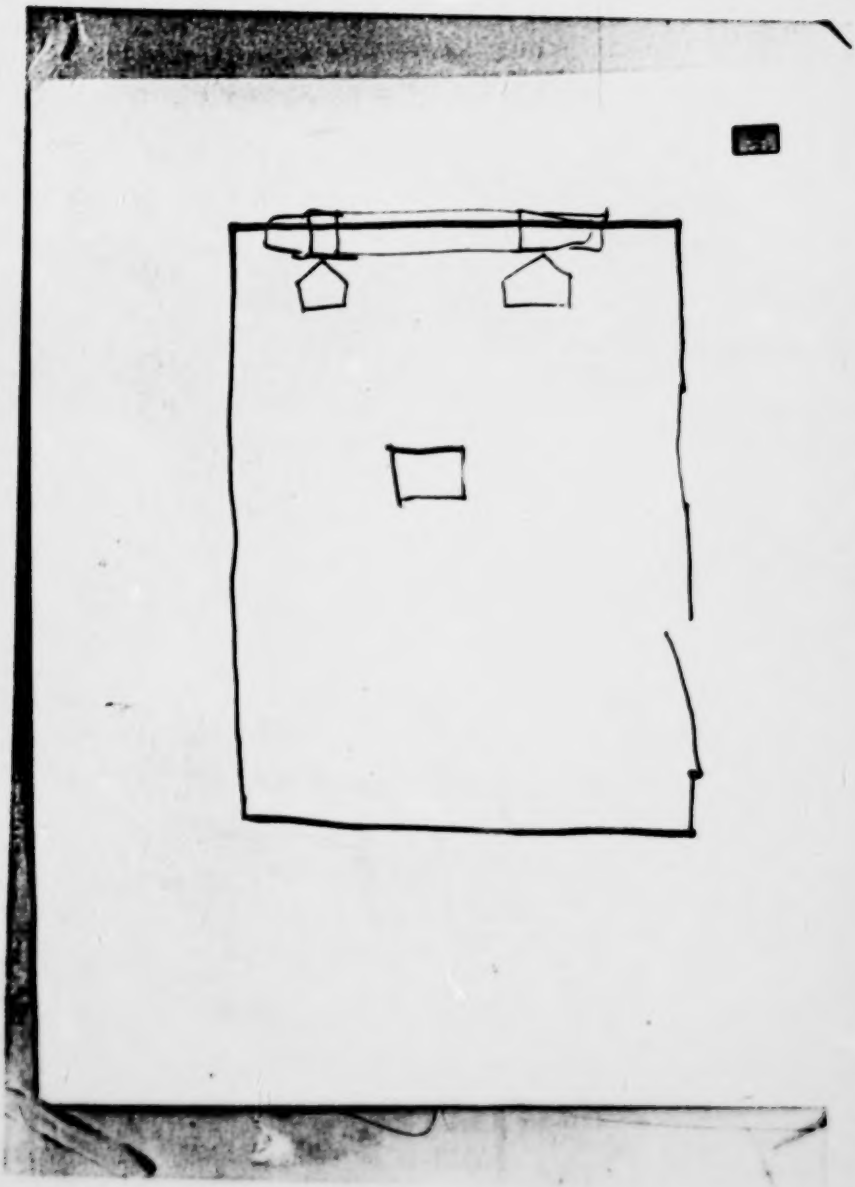


PLAINTIFF'S EXHIBIT 29



PLAINTIFF'S EXHIBIT 35

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSE CORPORATION,
Plaintiff

v.

CONSUMERS UNION OF UNITED STATES, INC.,

CIVIL ACTION
No. 71-481-C

AMENDED FINAL JUDGMENT

February 8, 1982

CAFFREY, Ch. J.

In accordance with the Opinion of the Court filed on December 30, 1981, and after consideration of the Plaintiff's Motion to Amend Final Judgment and the Plaintiff's Motion to Reduce Taxed Costs, it is ORDERED:

1. Judgment is entered for the plaintiff on Count III of the Complaint in the sum of $115,296.00 plus interest in the sum of $85,788.11, and costs in the

sum of $9,821.53, or a total of $210,905.64.

2. Judgment is entered for the defendant on Counts I and II of the Complaint.

/s/ Andrew A. Caffrey
Andrew A. Caffrey, Ch.J.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1230.

BOSE CORPORATION,
Plaintiff, Appellee,

v.

CONSUMERS UNION OF U.S., INC.,
Defendant, Appellant.

JUDGMENT

Entered: November 2, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed.

By the Court:
/s/ Dana H. Gallup
Clerk

[cc: Messrs. Pollet, Perry, McHugh and Kaufman]

NOTATION OF OPINIONS BELOW

The following opinions have been omitted in printing this Joint Appendix because they appear at the following pages of the Appendix to the Petition for a Writ of Certiorari:

Opinion of the United States District Court for the District of Massachusetts, dated January 21, 1981, at App. X38.

Opinion of the United States District Court for the District of Massachusetts, dated December 30, 1981, at App. X169.

Opinion of the United States Court of Appeals for the First Circuit, dated November 2, 1982, at App. X1.

The Order of the Court of Appeals denying petitioner's petition for rehearing, dated November 23, 1982, is set forth at pages 22-23 of the Petition.

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No. 82-1246

Office-Supreme Court, U.S.
FILED
MAR 26 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

BOSE CORPORATION,

Petitioner,

against

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals was correct in undertaking the independent review of the record mandated by numerous decisions of this Court and reversing the judgment in favor of a conceded public-figure plaintiff against a media defendant in a defamation case where the publisher and its employees exercised considerable care and expended much time and energy in researching and editing to achieve accuracy, and where the record plainly demonstrated that plaintiff made no showing whatever of constitutional "actual malice".

INDEX

Page

Question Presented i

Table of Authorities iii

Opinions Below 1

Statement of the Case 2

Reasons Why the Writ Should be Denied..... 23

1. This Court and All Others Unanimously Require an Appellate Court to Conduct an Independent Review of the Record in a Public-Figure Defamation Action..... 24

2. The Petition Should be Denied in any Event Because Numerous Other Issues in the Case Which were not Resolved by the Appellate Court Require Reversal of the District Court's Decision 36

Conclusion 37

TABLE OF AUTHORITIES

Cases — Pages

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, (1967).....32

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).....13

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).....32

Cher v. Forum International, 692 F.2d 634 (9th Cir. 1982)....30-31

In re Consumers Union of United States, Inc., 7 Med. L. Rptr. 2038 (S.D.N.Y. 1981).....4

Consumers Union of United States, Inc. v. Theordore Hamm Brewing Co., Inc., 314 F. Supp. 697 (D. Conn. 1970)....4

Garrison v. Louisiana, 379 U.S. 64 (1964).....35

Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970).....32

Inwood Laboratories, Inc. v. Ives, ___ U.S. ___, 102 S. Ct. 2182, 72 L.Ed 2d 606 (1982).....34

Loeb v. New Times Communications Corp., 497 F. Supp. 85 (S.D.N.Y. 1980).....35

National Ass'n of Gov't Employees, Inc. v. Central Broadcasting, Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980).....35

New York Times v. Sullivan, 376 U.S. 254 (1964).....13, 20, 21, 25-26, 30, 32, 34-35

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).....21, 27, 32

St. Amant v. Thompson, 390 U.S. 727 (1968).....35

Time, Inc. v. Pape, 401 U.S. 279 (1971).....21, 26, 32,

Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932 (2d Cir.) cert. denied, 449 U.S. 839 (1980).....18-19

Constitutional Provisions

U.S. Const. Amend I.....passim

Statutes

15 U.S.C. § 1125(a).....9

Federal Rules

Fed. R. Civ. P. 52(a).....passim

U.S. Sup. Ct. R. 17.....23

Other Authorities

Oakes, Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655 (1979).....29

R. Sack, Libel, Slander and Related Problems (1980).....28-29

OPINIONS BELOW

In its citations to the opinions and judgment below, the Petition for a Writ of Certiorari (pp. 2-3) neglects to include the order of the Court of Appeals of November 23, 1982 denying the plaintiff-appellee's petition for rehearing. This brief order is set forth below:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and the editorial

staff which reviewed and modified Seligson's report.

As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion is correct and was properly applied.

STATEMENT OF THE CASE

This is a product disparagement suit brought against Consumers Union of United States, Inc. (hereinafter "respondent", "Consumers Union", or "CU"), the well-known, highly respected not-for-profit independent consumer testing organization, which for more than

forty-five years has published the monthly magazine, CONSUMER REPORTS.[1]

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[1] At present, CU has approximately one hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.7 million. Over the years, CU has earned a widely respected and well-deserved reputation for accuracy and integrity, a fact which has been recognized by the courts. See Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., Inc., 314 F.Supp. 697, 698, 700 (D. Conn. 1970); In re Consumers Union of United States, Inc., 7 Med. L. Rptr. 2038, 2039 (S.D.N.Y. 1981) (CONSUMER REPORTS is a "public service publication which advances a primary First Amendment objective by providing a public forum for impartial discussion of the safety, fitness for use and reliability of products offered to the consuming public.")

The petitioner, Bose Corporation (hereinafter "petitioner" or "Bose"), alleged, inter alia, that its 901 Series I stereo loudspeaker was disparaged in an article entitled "Loudspeakers" appearing in the May 1970 issue of CONSUMER REPORTS. The facts underlying the case were set out in the opinions of the Court of Appeals(App.X2-8, 30-34)[2] and the District Court's liability decision (App.X40-60, 65-66, 94-100, 138-143). A fair synopsis of the events leading to the filing of this petition follows.

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[2] References to pages in the Appendix to the Petition are designated "App.X__". References to pages in the Appendix in the Court of Appeals are designated "A__".

The research and editing procedures that led to CU's publication of the disputed article began in early 1969; they were lengthy and involved many Consumers Union personnel and numerous internal checks and reviews(App.X65-66, A11, A112-A113, A140-A141, A201-A202). Each of the 24 speakers evaluated was subjected to an extensive battery of scientific tests and measurements which took several months to complete. The tests were designed to measure both the objective electrical and acoustical output of the loudspeakers and the more subjective, psychoacoustical aspects of their performance (A475-A476). Each

model tested was put through the same test protocol; two additional tests were devised to evaluate the special claims made for the Bose 901 and one other speaker of unconventional design (App.X59-60, A477-A478).

The tests were conducted and supervised by Arnold L. Seligson, then CU's Senior Project Engineer in charge of testing loudspeakers and other audio products, assisted by a project engineer, Alan Lefkow, two assistant project engineers, and a statistician(App.X56, A112-A113). Seligson and Lefkow, who both testified at trial, are extremely

capable engineers, highly skilled, experienced and expert in the testing and evaluation of loudspeakers(App.X30, 50-52).

Upon completion of the testing in January 1970, Seligson and Lefkow prepared a draft of the "Report to Editorial" -- a lengthy document intended for Consumers Union's editorial department which summarized in lay language the tests and their results. The sections of the draft referring to the Bose 901 were written by Seligson and reviewed by Lefkow(App.X65). The draft was reviewed by their superiors, revised, and the

revision widely circulated within Consumers Union(App.X66).

Using the Report to Editorial, a professional writer in Consumers Union's editorial department prepared a draft manuscript of the article (A12, A202). The draft and each subsequent revision and galley proof were circulated to and reviewed for accuracy by Seligson, Lefkow, their superiors and others in several departments of Consumers Union until the article was finally approved for publication(A147, A202).

From the moment of publication through the trial ten years later Bose claimed there were "numerous factual errors" -- all of them alleged to be damaging -- in the seven paragraphs of the article relating to the Bose 901 (A13). Bose sued Consumers Union for product disparagement, violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1974), and unfair competition.

The District Court severed the issues of liability and damages and held two non-jury trials. At the liability trial before Senior Judge Julian, Bose

offered but one witness, the founder, principal owner, chief executive officer and namesake of the plaintiff, Dr. Amar G. Bose. His testimony was largely unsubstantiated and conclusory. Bose presented no evidence of any objective tests or measurements of the Bose 901 that it or any one else made to demonstrate the falsity of Consumers Union's review.

Consumers Union on the other hand introduced a mountain of objective testimony, independent test data, expert testimony and other telling proof in support of the truth of the statements

challenged by Bose and the care taken in the testing and editorial process to attain a fair and accurate evaluation.

After 19 days of trial, Judge Julian found for Consumers Union on all claims save one. The Lanham Act and unfair competition claims were dismissed and four statements alleged to be disparaging were held either not proven false or not shown to be defamatory.

The District Court held only one portion of one phrase in the article to be false -- and only by a preponderance of the evidence. That isolated

fragment, "individual instruments heard through the Bose system ... tended to wander about the room," the Court found to be untrue because Consumers Union engineers testified that they heard "wandering sounds" only "within a few feet of the wall near which the Bose 901 loudspeakers were placed."(App.X101, footnote omitted). The difference between "tended to wander about the room" and "tended to wander about [or along] the wall" the Court found to be both false and disparaging.

Judge Julian than determined that Bose met the tests ehunciated by the

First Circuit in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) and was a "public figure at least with respect to the limited issues of the characteristics and quality of the Bose 901" (App.X132-133).[3] Accordingly, the rules of New York Times v. Sullivan, 376 U.S. 254 (1964), were held to apply.

Nonetheless, the District Court found that the disputed fragmentary phrase was published with "actual malice"(App.X143).

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[3] Bose conceded this finding on appeal and the Court of Appeals accepted the finding for purposes of the appeal (App.X21).

It did so without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based. The Court misapplied applicable law and inferred malice solely from its finding of falsity. CU's highly professional research, testing, writing and editing procedures (all followed in a concern to publish accurate judgments) and its consistently professed belief that what was written was true were ignored by the District Court. Instead, falsity plus the author's intelligence were held to create actual malice. In

the Court's words, Consumers Union's chief test engineer

> is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain, ordinary meaning(App.X142).

Next followed the trial on the issue of damages. Chief Judge Caffrey assessed damages in the amount of $115,296.00 plus interest and costs of $95,609.24, a total of $210,905.64 (App.X200-201). Based only upon hearsay assertions of a general decline in growth of sales (sales continued to increase

after the article's publication) and awarding compensation for critical but non-actionable portions of the article, this finding was plain error of constitutional dimension.[4]

Consumers Union's appeal to the First Circuit raised numerous questions of error in both the liability and damages holdings.[5] Because it could find

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[4] Because it reversed on issues of liability, the Court of Appeals did not review the damages findings.

[5] The assertions of error included, inter alia, the following: The comment is a statement of opinion which is absolutely privileged; if considered factual
(Footnote Continued on Next Page)

no evidence of actual malice, let alone clear and convincing proof, the Court of Appeals did not consider CU's principal claims of truth and nonactionable opinion. Assuming arguendo a false statement of fact (even though the court noted "... we are not sure that the statement that instruments tended to wander about the room is false" App.X19), the First Circuit independently reviewed the record for facts that would provide evidence

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(Footnote Continued from Previous Page)

the phrase is true; even if false, the statement is not defamatory; Bose was required to prove falsity with convincing clarity and not merely by a preponderance of the evidence; even if false and defamatory, the statement was not made with actual malice; and Bose did not properly prove special -- or any -- damages.

of "negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice"(App.X28). Since no such evidence existed, none was found (App.X28).

The Court remarked upon the similarities in preparation between the article in this case and that at issue in the case of Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 839 (1980)[6]. The First Circuit further

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[6] In Yiamouyiannis, the Second Circuit reviewed CU's work in preparing a series of articles on the fluoridation controversy and stated:
(Footnote Continued on Next Page)

noted that CU followed its normal editorial procedures here; that in

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(Footnote Continued from Previous Page)

> It is clear that [Consumers Union], through its agents, made a thorough investigation of the facts. Scientific writings and authorities in the field were consulted; authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism: the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.

619 F.2d at 940.

carrying out the more difficult task of performing original research CU used expert and experienced evaluators; and that to find actual malice on the facts of "this case would be to interpret that concept to require little more than proof of falsity, an interpretation that Justice Goldberg expressed fears about in his concurrence in New York Times v. Sullivan."(App.X36).

In carrying out its review of the record below, the First Circuit properly followed the standards mandated by an undeviating succession of cases in

this Court, [e.g., New York Times v. Sullivan, 376 U.S. 254, at 285, n.26; Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54, (1971)]:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof [citations omitted]. At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

(App.X22-23).

Disputing the First Circuit's adherence to the constitutionally-required standard of review, Bose petitioned that Court for rehearing. After the rehearing application was denied, Bose filed this petition for certiorari.

The decision of the First Circuit was eminently correct. It should not be disturbed by this Court and the petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

There can be no question that, on the record before it, the Court of Appeals was plainly correct in reversing the District Court and finding for Consumers Union. Bose's petition borders on the frivolous and meets none of the considerations set forth in U.S. Sup. Ct. R. 17, 28 U.S.C.A.

This Court has unswervingly held that in public-figure defamation cases reviewing courts must make an independent examination of the entire record to assure that the judgment below does not trample improperly upon consti-

tutionally protected speech. No court has ever held otherwise and Bose's assertions to the contrary are based on blind or intentional misconstruction.

This case does not warrant further expenditure of judicial time and energy.

1. This Court and All Others Unanimously Require an Apellate Court to Conduct an Independent Review of the Record in a Public-Figure Defamation Action.

Bose's contention that appellate review of public-figure defamation actions is limited by the "clearly erroneous" rule of Fed. R. Civ. P. 52(a) deliberately ignores the long and unbroken

line of Supreme Court decisions calling for independent appellate review in such cases.

The landmark case of New York Times v. Sullivan, 376 U.S. 254, 285 (1964), made it abundantly clear that in reviewing a libel case, because of the First Amendment concerns which permeate such cases, an appellate court's

> duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied....We must 'make an independent examination of the whole record,' ... so as to assure ourselves that the judgment does not

> constitute a forbidden intrusion on the field of free expression.

376 U.S. at 285 [Citation and footnote omitted.]

Again, in Time, Inc. v. Pape, 401 U.S. 279, 284, (1971), this Court referred to the "settled principle" that

> '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'... [W]e have frequently had occasion to review 'the evidence in the ... record to determine whether it could constitutionally support a judgment' for the plaintiff. [Citations omitted]

And, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, (1971), the plurality stated plainly that independent appellate review of constitutional facts is not merely permissive but is a constitutional requirement.

> Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'... The simple fact is that the First Amendment question of 'constitutional fact' compel this Court's de novo review.

403 U.S. at 54 (Citations omitted).

A leading commentator on the law of defamation has reviewed this Court's opinions on the issue and concluded:

> As a matter of constitutional law the judiciary has an expanded role in the fact-finding process in [cases involving First Amendment rights]. Trial and appellate courts are required to review the facts for themselves and to test them against the constitutional standard.
>
> The duty of the court [is] to reconsider the facts elicited below to assure that constitutional principles have properly been applied ..., a reviewing court is required to determine for itself that the jury verdict below is based upon a proper finding of publication

> with knowledge of falsity or subjective awareness of probable falsity proved with 'convincing clarity' by competent evidence. Otherwise, as a matter of constitutional law, the reviewing court cannot permit the verdict to stand.

R. Sack, Libel, Slander and Related Problems, 538, 560 (1980) (citations omitted); see also Oakes, Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655 (1979).

The foregoing authorities underscore the correctness of the standard of review applied by the Court of Appeals. Not a single case which Bose

cites (Pet. pp. 24-29) undermines these holdings or points toward a different result. None is a defamation or disparagement suit; none directly implicates the First Amendment in a relevant context; and none provides even the slightest suggestion that this Court has altered the independent review requirements of New York Times and its progeney.

Bose's bald assertion that the decision below conflicts with prior decisions of this Court is meritless to the point of being disingenuous.

Petitioner's citation of Cher v. Forum International, 692 F.2d 634

(9th Cir. 1982), is likewise wholly inapposite and presents no departure from this Court's mandated standard of independent review. Nowhere in that case did the Ninth Circuit hold that it was limited by Fed. R. Civ. P. 52(a) in its review of the First Amendment claim there in issue.

Quite the opposite. The Ninth Circuit stated

> **Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases.**

Id. at 640.

The cases are legion[7] and unanimous that an appellate court reviewing a judgment in a defamation case brought by a public figure against a media defendant must undertake an independent review of the record to assure proper application of First Amendment principles to the facts.

The First Circuit properly discharged this constitutional obligation.

---

[7] See, e.g., New York Times v. Sullivan, 376 U.S. 254, 285 (1964); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 11 (1970); Time, Inc. v. Pape, 401 U.S. at 284; Rosenbloom v. Metromedia, 403 U.S. 54 (1971); Buckley v. Littell, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

Bose's assertion that the First Circuit improperly overturned credibility findings of the trial judge likewise miscontrues the facts and the governing legal principles. The Court of Appeals properly recognized the District Court's finding of actual malice as nothing more than an inference based on the alleged falsity alone(App.X36). In so holding, the appeals court did not dispute any true credibility or demeanor finding of the District Court Judge.

Actual malice was premised by District Judge Julian solely upon a misapplication of the law to the facts in the record, an error manifestly not

limited by Rule 52. See Inwood Laboratories, Inc. v. Ives, ____ U.S. ___, 102 S. Ct. 2182, 2189 n.15, 72 L.Ed. 2d 606, 616 n.15 (1982).

The reversal by the Court of Appeals was based on the District Court's clearly erroneous holding that the use of "imprecise" or even "false" language, without more, was sufficient to sustain a finding of actual malice. The First Circuit correctly held that the Constitution prohibits such a result for it would deprive the press of the protection of the actual malice standard altogether and thereby render meaningless the First Amendment shield provided by New York

Times v. Sullivan. See Garrison v. Louisiana, 379 U.S. 64, 79 (1964); St. Amant v. Thompson, 390 U.S. 727, 730-731 (1968); Time, Inc. v. Pape, 401 U.S. at 289-292; Loeb v. New Times Communications Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980); National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980).

As the First Circuit was plainly correct in following the standard of independent review dictated by this Court in New York Times, and there is

not an iota of evidence in the record to sustain a finding of actual malice, the petition for certiorari should be denied.

2. The Petition Should be Denied in Any Event Because Numerous Other Issues in the Case Which were Not Resolved by the Appellate Court Require Reversal of the District Court's Decision

Consumers Union's appeal to the First Circuit challenged several distinct holdings of the District Court as error. The appellate court focused on and decided but one issue: whether, assuming the fragment at issue was factual (as

opposed to opinion) and further assuming it was false, the evidence supported a finding of actual malice.

It is significant, however that the appellate court expressed doubts that the statement was in fact false; the court merely assumed falsity arguendo (App.X19-20). It also made no finding that the statement was actually an expression of fact rather than opinion; again, it merely postulated that it was(App.X19-20). Nor did the First Circuit address CU's argument that a libel plaintiff must prove falsity with clear and convincing proof, not merely by a preponderance of the evidence as the

District Court held(App.X20n.8). And because it reversed the finding of liability, the Court of Appeals never ruled on the constitutional and common law errors committed by the District Court in awarding the plaintiff over $200,000 in damages, absent proof of proper special damages and without requiring Bose to show that any losses were a result of the single statement held to be actionable.

Thus even were the writ to be granted, this twelve-year old litigation would not finally be concluded; many other complicated issues of critical

importance to First Amendment jurisprudence would remain to be resolved.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

Page

Table of Contents

1. The Petition reproduced verbatim the order denying rehearing. 1

2. An independent appellate examination of the whole record can be made without setting aside findings of fact that are not clearly erroneous. 2

3. That the Court of Appeals did not reverse the District Court on all grounds urged by respondent is irrelevant to whether the Court ought to review the important questions presented. 7

Table of Authorities

Cases

Cher v. Forum International, 692 F.2d 634 7

St. Amant v. Thompson, 390 U.S. 727 2

Federal Rules of Civil Procedure

Fed. R. Civ. P. 52(a) 2, 7, 8

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REPLY BRIEF FOR PETITIONER

---

1. Respondent begins its brief by misleadingly representing:

> In its citations to the opinions and judgment below, the Petition for a Writ of Certiorari (pp. 2-3) neglects to include the order of the Court of Appeals of November 23, 1982, denying the plaintiff-appellee's petition for rehearing (Br. Op. 1).

The Petition reproduced this order

verbatim (Pet. 22-23).

2. Respondent argues:

> Bose's contention that appellate review of public-figure defamation actions is limited by the "clearly erroneous" rule of Fed. R. Civ. P. 52(a) deliberately ignores the long and unbroken line of Supreme Court decisions calling for independent appellate review in such cases (Br. Op. 24-25).

None of the cases cited by respondent mention Rule 52(a) (Br. Op. 25-27).

Respondent does not mention *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968) where the Court said:

> . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> . . .
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he

> published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

Respondent also argues,

> The Court of Appeals properly recognized the District Court's finding of actual malice as nothing more than an inference based on the alleged falsity alone (App. X36). In so holding, the appeals court did not dispute any true credibility or demeanor finding of the District Court Judge (Br. Op. 33).

Judgment of the credibility of author Seligson as a witness was for the trial court in determining whether "the defendant in fact entertained serious doubts as to the truth of his publication." The District Court found:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. . . .
>
> Based on the above finding that Seligson's testimony to the contrary is not credible, the

> Court further finds that at the time of the Article's publication Seligson knew that the words "individual instruments . . . tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test (App. X142-43)."

It is this finding of fact of knowing falsity based on "the opportunity of the trial court to judge of the credibility of the witnesses," that we submit cannot be set aside unless clearly erroneous. Respondent's contention that the District Court made this finding "without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based . . . [by inferring] malice solely from its finding of falsity (Br. Op. 14)" is without foundation. Seligson testified that he was one of the two "panelists" and acknowledged that the "panelists" did not hear instruments

through the Bose system that tended to wander about the room (Pet. 10-16. App. X99-107, X138-143). Respondent's president "felt that we [respondent] were, in his opinion, weakest in our arguments about the wandering instruments (Pet. 13, A487-88, A208-11)." And respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute the false claim by making demonstrations using the same recordings (Pet. 12, App. X194-95).

Respondent points to no case holding that the "clearly erroneous" rule can be disregarded in setting aside findings of fact when a constitutional right is asserted. Regardless of whether the Court follows the First Circuit rule rejecting or the Ninth Circuit rule accepting the

"clearly erroneous" rule in reviewing findings of fact when a constitutional right is involved, the importance of this Court selecting a uniform national rule and the general applicability of that rule to a wide number of cases can hardly be doubted. Resolution of the conflict is particularly appropriate in this case because it involves the constitutional rights of parties to a trial without jury to have questions of credibility of witnesses resolved by the trial judge who actually heard the witnesses testify and observed their demeanor (Pet. 34-35).

Respondent implies that an independent review of the entire record is incompatible with following the "clearly erroneous" rule (Br. Op. 23-32). But that review can be made without setting aside those findings of fact which are not clearly erroneous. The Ninth Circuit

Court of Appeals in *Cher v. Forum International*, 692 F.2d 634 (9th Cir. 1982) "examined the trier's findings with the extra care required in such cases" while still ruling that regardless of the appellate court's agreement "with the trier's finding of knowing falsity, or fall[ing] back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd." 692 F.2d at 640. Respondent falsely states, "Nowhere in that case did the Ninth Circuit hold that it was limited by Fed. R. Civ. P. 52(a) in its review of the First Amendment claim there in issue (Br. Op. 31)."

3. Respondent argues that the petition should be denied because numerous other issues not resolved by the appellate court require reversal of the district

court's decision (Br. Op. 36). But that has no bearing on whether the important issues actually resolved by the Court of Appeals justify review in this Court. The Court of Appeals ruled that it was "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); . . . [but] must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof (App. X22-23)." This broad rule is not restricted to governing constitutional law under any specific article of or amendment to the Constitution. The conflict with decisions of this Court, the Ninth Circuit and other Courts of Appeals, the applicability of the "clearly erroneous" rule to many cases, the national importance of the questions

presented, the constitutional rights involved, and the other reasons presented in the Petition support a conclusion that the Petition should be granted, regardless of which party eventually prevails.

CONCLUSION

For the foregoing reasons and those advanced in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CONSUMERS UNION OF UNITED STATES, INC.,
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FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a Court of Appeals is bound by the "clearly erroneous" rule of FED. R. CIV. P.52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial, that a false and disparaging statement was published with knowledge that it was false or with reckless disregard for the truth, when a constitutional right is asserted.

2. Whether an appellate court may reject the findings of a United States District Court judge who was the trier of fact and who found on the basis of clear and convincing evidence that the defendant published a false statement with knowledge of its falsity or with reckless disregard for the truth and further found expressly that the author's testimony to the contrary was not credible.

3. Whether subsequent editorial

review by the editorial staff of a publisher can bar relief for publication of a false and disparaging statement written by an employee of the publisher, where the trier of fact found on the basis of clear and convincing evidence that the author knew that the statement was false when he wrote it or acted with reckless disregard of its truth or falsity.

4. Whether an appellate court can overturn a judgment for a plaintiff under the *New York Times Co. v. Sullivan* standard on the basis of testimony about editorial review which the trial judge, sitting as finder of fact, had found to be "wholly untrustworthy and ... not credible".

5. Whether an appellate court can deprive a party of compensatory damages in a product defamation case by ignoring findings on credibility made by the trial judge and instead relying on evidence

which the trial judge found to be not credible.

6. Whether an appellate court can overturn a trial court's finding of "actual malice" when there was sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.

INDEX

	Page
Questions Presented	i
Citations	vii
Citations to Opinions and Judgments Delivered in the Court Below	1
Jurisdiction	3
Constitutional Provisions Involved	4
Federal Rule of Civil Procedure Involved	4
Statement	5
A. Introduction	5
B. The Court of Appeals agreed with the District Court's finding that the statement "Worse, individual instruments heard through the Bose system . . . tended to wander about the room" was disparaging and assumed that it was a false statement of fact.	9
C. The District Court found actual malice based on clear and convincing proof.	15
D. The Court of Appeals ruled that the finding of actual malice was not based on clear and convincing proof..	25

(continued) Page

Summary of the Argument 33

Argument 40

I. It is settled that Fed. R. Civ. P. 52(a) requires that findings of fact not be set aside unless clearly erroneous even when constitutional rights are asserted. . . . 40

II. The findings by the District Court that author Seligson knew at the time of the publication of the article that the false and disparaging statement did not accurately describe the effects that he and Lefkow heard during the "special listening test" and that his testimony to the contrary was not credible and the other evidence support the finding that petitioner proved by clear and convincing evidence that respondent published the false and disparaging statement with "actual malice." 50

(continued) Page

III. By rejecting the trial judge's finding on the credibility of witnesses and relying on testimony which the trial judge found to be not credible, the Court of Appeals has deprived the petitioner of property without due process of law. 61

IV. Nothing in New York Times or its progeny allows the Court of Appeals to ignore the requirements of Rule 52(a). 70

Conclusion 83

(continued) Page

CITATIONS

Cases

Boyd v. Boyd, 252 N.Y. 422. 65

Cantrell v. Forest City Pub. Co., 419 U.S. 245 . . . . . 47,54, 60

Chambers v. Mississippi, 410 U.S. 284 63

Cher v. Forum International, 694 F.2d 634 35,44

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690. . . 72

Curtis Publishing Co. v. Butts, 388 U.S. 130 75

Davis v. Alaska, 415 U.S. 308 . . . 64

Dayton Board of Education v. Brinkman, 433 U.S. 406 . . . . . 34,42, 43

Dayton Board of Education v. Brinkman, 443 U.S. 526 . . . . . 34,42, 43,44

Garrison v. Louisiana, 379 U.S. 64 54

(continued)

	Page
Gertz v. Robert Welch, Inc., 418 U.S. 323	75
Goldberg v. Kelly, 379 U.S. 254	63
Greene v. McElroy, 360 U.S. 474	63
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 72 L.Ed.2d 606 . . .	33,41
Logan v. Zimmerman Brush Co., 455 U.S. 422	38,62
Mayor v. Educational Equality League, 425 U.S. 605. .	34,42, 43
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306	38,62
New York Times Co. v. Sullivan, 376 U.S. 254	1,16, 39,40, 70,71, 74,75, 76,77, 79
Pointer v. Texas, 380 U.S. 400. . .	63
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464	64
Pullman-Standard v. Swint, 456 U.S. 273	33,41

(continued) Page

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 75

St. Amant v. Thompson, 390 U.S. 727 25,35, 40,43, 47,73

Societe International v. Rogers, 357 U.S. 197 65

Time, Inc. v. Pape, 401 U.S. 279. . 39,70, 72,77

United States v. Oregon State Medical Society, 343 U.S. 326. . 65

United States v. Raddatz, 447 U.S. 667 . . . . . 45,49, 65,66

Wingo v. Wedding, 418 U.S. 461. . . 64

Constitutional Provisions

U.S. Const. Amend. I 4
Amend. V 4,38,61
Amend. VII 71

Statutes

15 U.S.C. § 1121 7

28 U.S.C. § 44(a) 47
§ 133 47
§ 1254(1) 3
§ 1332(a)(1). 7
§ 1338(a) 7
§ 1338(b) 7

(continued)

Page

Federal Rules of Civil Procedure

FED. R. CIV. P. 37 65
52(a) 4,26,33, 34,38, 40,41, 42,43, 49,61, 65,70, 71,83

Miscellaneous

Annot., 61 L.ed 2d 944 75,76

NO. 82-1246

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v.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

BRIEF FOR PETITIONER

Citations to the Opinions and Judgments Delivered in the Courts Below

The opinion of the United States District Court for the District of Massachusetts on liability (App. X38-168),[1] is

[1] Reference to the Petition is to "Pet." page numbers. Reference to the separate appendix filed with the petition containing the lower court opinions is to "App." followed by "X" page numbers. Reference to the Joint Appendix herein is

reported in 508 F.Supp. 1249, 7 Media L. Rep. (BNA) 1069, and on damages (App. X168-200), in 529 F.Supp. 357, 7 Media L. Rep. (BNA) 2481. The Amended Final Judgment is at J.A. 344. The opinion of the Court of Appeals (App. X1-X37), is reported in 692 F.2d 189, 8 Media L. Rep. (BNA) 2391, and its judgment is at J.A. 346.

The opinion of the District Court denying respondent's motion for summary judgment is reported in 84 F.R.D. 682, 210 U.S.P.Q. (BNA) 645, 5 Media L. Rep. (BNA) 2404, in denying respondent's motion to dismiss in 181 U.S.P.Q. (BNA) 543, in certifying a question of state law to the Massachusetts Supreme Judicial Court in

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to "J.A." page numbers. Reference to the appendix in the Court of Appeals is to "A" page numbers. Reference to the trial court transcript is to "Tr." page numbers. Reference to petitioner's and respondent's exhibits is to "PX" numbers and "DX" letters, respectively.

19 Fed. R. Serv. 2d (Callaghan) 442, and in requiring petitioner to plead special damages in 16 Fed. R. Serv. 2d (Callaghan) 1090. The opinion of the Massachusetts Supreme Judicial Court ruling that the filing of the complaint did not toll the statute of limitations for respondent's counterclaims is reported in 367 Mass. 424, 326 N.E.2d 8.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1982 (J.A. 7, 346). A timely petition for rehearing suggesting rehearing *en banc* was denied on November 23, 1982 (J.A. 7). The petition for a writ of certiorari was filed on January 20, 1983, and granted on April 25, 1983 (J.A. 7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .. U.S. Const. Amend. I.

No person shall . . . be deprived of . . . property, without due process of law . . .. U.S. Const. Amend. V.

Federal Rule of Civil Procedure Involved

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it

will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement

A. Introduction.

In the May 1970 issue (PX2, Tr. 9, 13) of respondent's monthly magazine, *Consumer Reports*, respondent reported on a series of tests and measurements conducted by its engineers in an article entitled "Loudspeakers" (the Article) (PX7, Tr. 10, 13)[2]. In addition to an evaluation of the quality and performance of 24 medium-priced loudspeakers, represented as being based on objective tests and measurements conducted by respondent's engineers, the Article reported on tests of petitioner's more expensive Bose 901 loudspeaker system

[2]Ten copies of PX2 have been deposited with the Clerk. The Article, PX7, appears at pp. 272-78 of PX2 (J.A. 338).

in a boxed-off section picturing the 901 system (App. X46-50, 54). Prior to publication of the Article, the Bose 901 system had received the best reviews which ever had been given to a loudspeaker product (App. X196).

Dr. Amar G. Bose, petitioner's president and principal witness, invented the the 901 system, which was "unique and unconventional" in shape and design. Respondent conceded that Dr. Bose is an expert in the field of loudspeaker design (App. X41-43, J.A. 8-26).

After attempts to obtain a retraction failed (J.A. 77), petitioner commenced this action in the United States Court for the District of Massachusetts on February 23, 1971 (J.A. 2) to obtain relief for the harm caused by respondent's false and disparaging report on the Bose 901 loudspeaker system. Jurisdiction was

based on diversity of citizenship, 28 U.S.C. § 1332(a)(1), on the Lanham Act, 15 U.S.C. § 1121, and on 28 U.S.C. § 1338(a) and (b) (App. X38-39).

After 19 days of trial on all issues except damages (App. X39) during February, March and April 1980 before Senior District Judge Julian without a jury (J.A. 2-5), the District Court filed an opinion (App. X38-168) on January 21, 1981 (J.A. 5) finding that petitioner had sustained its burden of proving, by clear and convincing proof, that respondent published a false statement of fact disparaging the Bose 901 system with knowledge that the statement was false or with reckless disregard for the falsity, as alleged in Count III of the complaint. It deferred entering judgment until after the separate trial on the issue of damages. The District Court ruled that

petitioner did not sustain its burden of proof on Counts I and II of the complaint, which were based on common law tort liability and violation of section 43(a) of the Lanham Act, respectively (App. X143-46).

After two and a half days of trial on damages before Chief Judge Caffrey without a jury in June 1981 (J.A. 5), the District Court entered an opinion (App. X169-201) and final judgment for petitioner on December 30, 1981 (J.A. 5). Petitioner moved to amend the final judgment on January 8, 1982 (J.A. 5). The District Court entered an Amended Final Judgment on February 8, 1982, awarding petitioner $210,905.64 in damages, interest and costs (J.A. 6, 344, App. X1).

Before analyzing specific statements in the Article, the District Court said, "The Court concludes that the Article,

when read as a whole, is disparaging (App. X70)."

The District Court found a number of representations made by respondent in the Article to be false or misleading, but not damaging to petitioner (App. X70-71, X76-77), found a statement of opinion not actionable (App. X80), and found that petitioner had not sustained its burden of proof with respect to other statements (App. X85, X99).

B. The Court of Appeals agreed with the District Court's finding that the statement "Worse, individual instruments heard through the Bose system . . . tended to wander about the room," was disparaging and assumed that it was a false statement of fact.

The District Court found the statement in the Article, "Worse, individual instruments heard through the *Bose* system . . . tended to wander about the room," to be a false and disparaging statement of fact which was damaging to petitioner (App. X99-106).

The statement purported to describe what a "panel" of two engineers, Seligson, the author, and his assistant, Lefkow, observed during a "special listening test (J.A. 96-103)." Seligson and Lefkow said they observed sounds of only a violin moving back and forth between a pair of Bose 901 loudspeakers near a wall at one end of the listening room (J.A. 148, 156-60, 244-47.

Both Seligson and Lefkow indicated on large sheets prepared in open court during cross examination by a red line with arrowheads and a red rectangle, respectively, the region between the pair of Bose 901 stereo loudspeakers (represented by pentagons which look like home plate on a baseball field) in which they observed movement of only some violin notes when playing an unidentified record (PX29, J.A. 170-71, PX35, J.A. 257-58;

J.A. 156-60, 244-47). Reproductions of these exhibits follow this page.

The District Court said, "Because such movement between two loudspeakers is a common effect [with all stereo loudspeaker systems] and is to be expected, a reader would not be surprised to read about 'instruments' moving along the wall between two loudspeakers (App. X101)." Dr. Bose, Dr. Green (respondent's psychoacoustic expert), and Lefkow agreed that such movement between left and right loudspeakers is a common effect with all stereo loudspeaker systems (J.A. 52-57, 234-36, 312-14, 325-26).

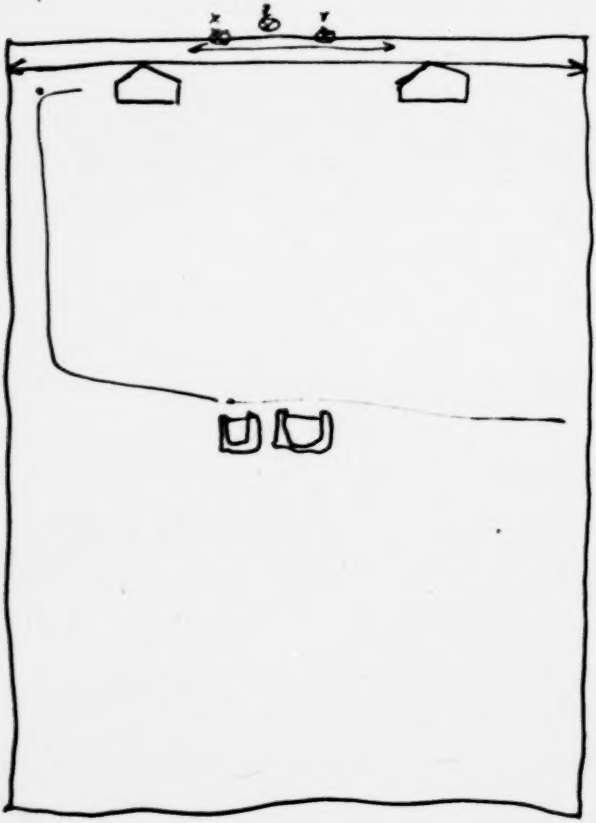
The District Court said:

> The Court also finds that the average reader would interpret the word "about" in its plain ordinary meaning. Florman [respondent's technical director] agreed that the word "about" in this context means the same thing as "around". Tr. 12-117, 118 (J.A. 219). In fact, Seligson's initial draft contained the words "around

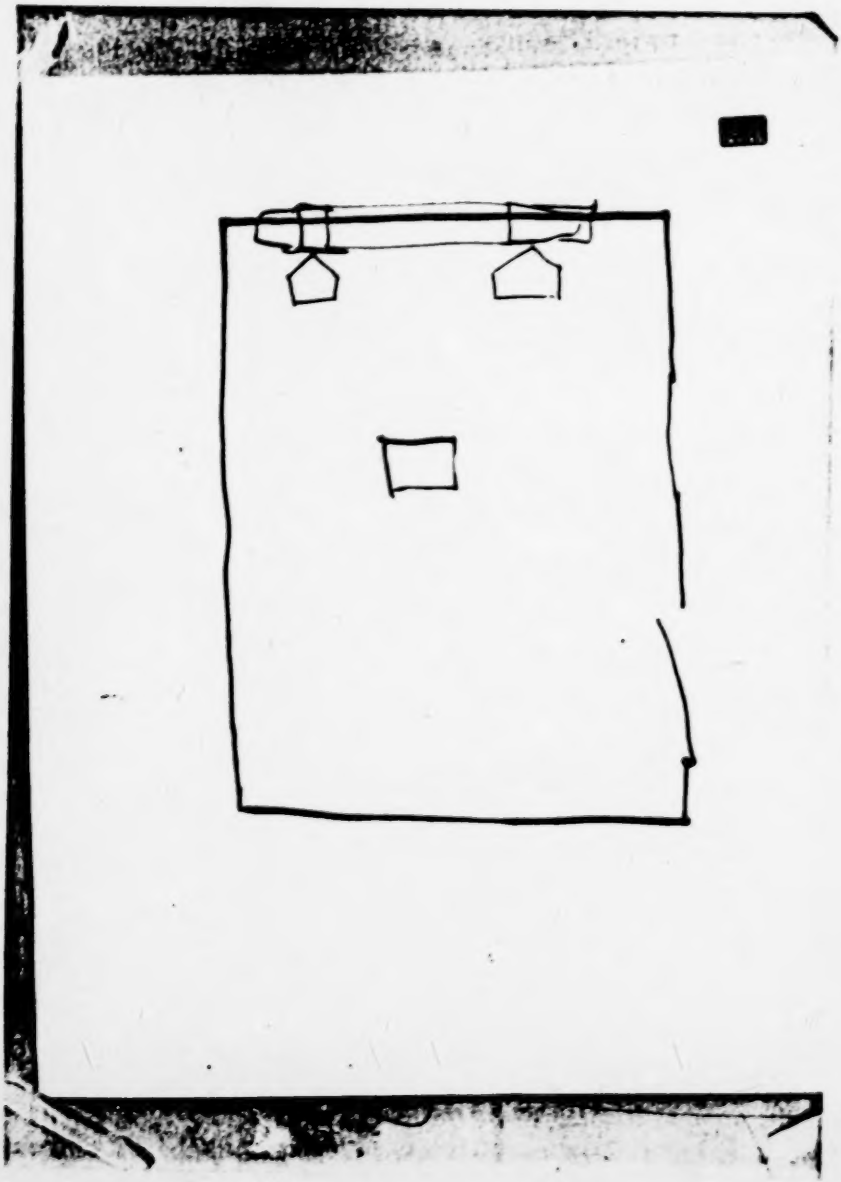
the room," rather than "about the room." PX-10, at p. 29 (App. X155, X161).

The absence of similar observations by other listeners, both untrained and professional, tends to support the conclusion that Seligson and Lefkow did not hear "instruments" that "tended to wander about the room." If the Bose 901 actually produced such unusual auditory effects it would be natural to assume that Bose 901 owners would complain to Bose about them. Yet Dr. Bose testified that to his knowledge no Bose 901 purchaser had ever complained to Bose about the Bose 901 causing "instruments" to appear to wander about the room (J.A. 80-81). In addition, none of the reviews of the Bose 901 that were reprinted by Bose (DX-A) contain a statement that could be construed as referring to wandering "instruments." On the contrary, one of the reviews (DX-A p. 13), published in Stereo & Hi Fi Times, contains the following statement, which seems to directly contradict CU's comment about "instruments" that "tended to wander about the room":

> A multi-directional speaker seems to have its sound escape from its box. The source of the sound becomes an area of space above and behind the actual enclosure. This is created beautifully by these speakers. A stereo pair fills the wall with stereo, yet each instrument has its



PLAINTIFF'S EXHIBIT 29



PLAINTIFF'S EXHIBIT 35

> prescribed space - and it stays there. You can spread these speakers much wider apart than conventional boxes without creating a "hole-in-the-middle:" effect. DX-A, p. 13 (Emphasis added).

> Based on the foregoing analysis, the Court finds that the statement in the May 1970 Article that "individual instruments heard through the Bose system . . . tended to wander about the room" is false. The Court also finds that the statement is disparaging. A statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product could have no effect other than to harm the reputation of the product. That such a harmful effect was intended is demonstrated by the use of the word "worse" to introduce the sentence. Use of the word "worse" obviously indicates that what preceded was a deficiency but what followed would be an ever greater deficiency in the product (App. X103-06) (footnote omitted).

In reviewing and reversing the judgment of the District Court, the Court of Appeals held the statement to be disparaging and assumed that it was a false statement of fact (App. X19-21).

The Court of Appeals observed that

> the seeming scientific nature of the article--indicated by quantitative ratings, a description in the beginning of the article of the laboratory testing performed, and the use of such terms as "panelists" and "engineers" to describe the CU employees who performed the tests--would support the position that the statements are factual (App. X18).

The Article makes reference 32 times to words or phrases from the following group: "test program," "test," "test out," "tested," "tests," "testing," "testing methods," "carefully designed listening-panel test," "test speakers," "listening test," "objective and subjective tests," and "objective laboratory tests." The Article makes reference 10 times to words or phrases from the following group: "laboratory measurements," "measurable," "measurable factors," "measured in the lab," "measurement," "measured directly," "inferred from other measurements," "measurements,"

"quantitative measurements," and "heard and measured." The Article makes reference 11 times to words or phrases from the following group: "listening-panel," "panelists," and "panel." The article twice makes reference to "CU's engineers." PX7.

The District Court found:

> Dr. Bose, who attempted to combat the perceived negative effects of the Article by visiting and talking with his dealers, testified that with respect to the comments contained in the Article the most frequent complaints that he heard from dealers and consumers concerned "The enlarged and wandering instruments and the statement about gigantic power required." Tr. 2-144 (J.A. 62). Thus, the false statement that "individual instruments heard through the *Bose* system . . . tended to wander about the room" cannot be considered a *de minimis* violation of the plaintiff's rights (App. X106-07).

C. The District Court found actual malice based on clear and convincing proof.

After finding the statement false and disparaging, the District Court ruled that

the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied to product disparagement cases, and that petitioner was a "public figure." The District Court therefore required petitioner to show with clear and convincing proof that respondent had published the false disparaging statement with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X132-33).

The District Court observed that petitioner did not ask the Court to infer the existence of actual malice from falsity alone, but to couple the falsity of the statement with the fact that the two engineers of respondent who made up the "panel" for the "special listening test," must have known that the statement was false (App. X140). In rejecting the profession of Seligson's good faith belief

in the accuracy of the Article as written (J.A. 123-24, 147, 169), the District Court said, "Because Seligson wrote the words upon which the false statement in the Article was based, it is his state of mind that is critical[44] (App. X140-41)."

The District Court concluded, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

Monte Florman, the associate technical director of respondent, also

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[44]The members of CU's editorial department would naturally have to rely on Seligson's representations that a panel had heard instruments that "tended to wander about the room." Lefkow testified that the Article as a whole accurately reflected CU's test data. Nevertheless, to the extent that Lefkow, as Seligson's subordinate and friend, would be expected to substantiate Seligson's position, right or wrong, his testimony can be discounted. In addition, Lefkow was never specifically questioned about the critical words "about the room (App. X168)."

testified at trial on various matters (J.A. 195-221), including what he observed during a June 1970 listening test after petitioner complained about the Article (J.A. 203-06).

The District Court ruled on Florman's credibility:

> The defendant also places reliance on the testimony of its technical director, Monte Florman, who claims to have heard certain unusual auditory effects when listening to the Bose 901. After appraising Florman's demeanor and the substance of his testimony, however, the Court finds that Florman's testimony is wholly untrustworthy and is not credible. Consequently, to the extent that Florman's testimony differs from that of Seligson and Lefkow, it has been disregarded (App. X163 n.33).

The District Court ruled:

> [T]he Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X143).

The two "panelists" testified that

they made the tests on which the false statement was based on January 23, 1970, about three months before the Article was published, and recorded their observations on a little over a page in a laboratory project data book under the caption "Personal Observation on Bose 901 upon listening for several hours (PX9, Tr. 85; J.A. 339-40)." Seligson and Lefkow read these observations into the record (J.A. 97-103, 232-34). No other information was recorded on this "special listening test."

The only instruments identified in these recorded observations are a violin and piano. Both Seligson and Lefkow testified that the piano they heard through the Bose system did not move (J.A. 148, 159, 244).

After publication of the Article, petitioner complained and Dr. Bose asked to meet with respondent's management and

technical personnel. This meeting was held at respondent's laboratories on June 3, 1970 (J.A. 63).

In a memorandum of Florman dated June 4, 1970 (PX33, J.A. 209, 221; Pet. 13), the following appears relative to the false and disparaging statement.

> . . . Bose took extremely strong exception to the concept of wandering, and expressed the view that on theoretical grounds such an observation was patently impossible. There was some discussion on the philosophical considerations of subjective observations made that run counter to theoretical considerations. (After the meeting, WS [Walker Sandbach, then respondent's executive director] reported to MF [Monte Florman, respondent's technical director and the author of the memorandum] that CEW [Colston E. Warne, then respondent's president] felt that we were, in his opinion, weakest in our arguments about the wandering instruments. . .. (J.A. 209-13).

Seligson and Nagel, then respondent's technical director, were also at this June 1970 meeting (J.A. 63-64). Dr. Bose asked (1) if the entire "panel" had heard

had heard the wandering instruments through the Bose system and, (2) "Did the instruments just move back and forth between the two speakers along the wall or did they actually move out into the room?" Seligson replied that the instruments moved out into the room, and the entire panel had heard these wandering instruments (J.A. 64-65).

Dr. Bose testified that he then asked how many members were on the panel, because he had read the article entitled "How Consumers Union Tests Speakers" published in 1969 in Stereo Review magazine authored by Seligson (Tr. 39) representing that respondent used 12 music students as a panel for its loudspeaker listening tests (PX6, Tr.40). Seligson said that the "panel" which allegedly heard individual instruments through the Bose system

wandering about the room consisted of "two (J.A. 66-67)."

Dr. Bose twice asked for a demonstration of this phenomenon (J.A. 67-71). Seligson acknowledged that Dr. Bose made this request and testified that it would have taken him about a half hour to set up a demonstration of the Bose 901 speakers through which the "panelists" allegedly had heard instruments wandering about the room (J.A. 139).

Dr. Bose requested the names of the records that the "panelists" played during the "special listening test" when they allegedly heard instruments wandering about the room. Seligson promised he would furnish the names of those records to Dr. Bose, but petitioner was never furnished with these names (J.A. 71, A394-95). Respondent did not identify any of these records at trial (J.A. 151) nor

make any record of the stereo records used during a prior listening test by Lefkow (J.A. 236-37).

The District Court found that respondent "refused to disclose to Bose the names of the recordings on which the CU 'panelists' supposedly had heard the 'wandering instruments', so Bose was unable to refute that false claim by making demonstrations using the same recordings (App. X194-95)."

Seligson wrote the first draft of the portion of the Article relating to the Bose 901 system in a Report to Editorial (PX10; J.A. 125-29, App. 65). Seligson there listed as one of "a number of other disturbing aspects to the Bose system. [that] [i]nstruments not only could not be placed with precision but appeared to suffer from giganticism and a tendency to wander around the room . . . (App. X155, X161)."

Seligson repeatedly checked the statement for accuracy before publication in the Article (J.A. 129-37, 145, App. X32-33).

Seligson testified on direct examination that while listening to the music, "we walked around the room (J.A. 99)" and on cross examination that "You could say I wandered about the room (J.A. 153)."

After quoting a portion of Seligson's testimony on cross examination concerning the "instruments" that "tended to wander about the room (App. X141, J.A. 169)" following testimony by Seligson that the false and disparaging statement might spur consumers to buy the Bose speakers (J.A. 163-69), the District Court said:

> Thus, according to Seligson, the words used in the Article -- "About the room" -- mean something different to him than they do to the populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he

> still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its plain ordinary meaning (App. X141-42).

The District Court set forth the rule it was applying:

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1967) [sic; 1968[(App. X139).

D. The Court of Appeals ruled that the finding of actual malice was not based on clear and convincing proof.

After noting that petitioner did not dispute that it is a "public figure" with respect to the subject matter of the Article (App. X21), the Court of Appeals said:

We focus, therefore, on the district court's holding that Bose proved by clear and convincing evidence that CU published the words "[Worse,] individual instruments [heard through the *Bose* system] . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity. In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof. . . . At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact (App. X22-23).

The Court of Appeals observed:

The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. . . . A court typically will infer actual malice from objective facts. . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is

lacking in this case (App. X27-28).

The Court of Appeals did not mention the District Court's analysis of Seligson's motivation to disparage the Bose 901 system under the heading "Motivation (App. X133-38)." After finding that Seligson did not downgrade the Bose 901 system in order to smooth the way for his own invention of a loudspeaker on which a patent was granted on November 4, 1969, while he and other engineers and technicians of respondent were making tests and measurements on loudspeakers for the Article (App. X61-65, X136), the District Court said:

> It does not necessarily follow from this finding, however, as the defendant suggests, that Seligson therefore had no reason at all to downgrade the Bose 901. The record discloses at least two other influences that could have caused Seligson to make deprecatory comments about the Bose 901. First, the plaintiff suggested, but presented scant proof, that the defendant's magazine

has a built-in bias against higher-priced products because it claims to save money for consumers. According to the plaintiff, such a bias would lead the defendant to disparage higher-priced products such as the Bose 901. Second, according to Dr. Bose, the defendant's executive officer, Walker Sandbach, stated that CU resorts to the use of "sarcasm" and "spice" in order to boost circulation. Dr. Bose testified, without contradiction, that the defendant's officers told him that a survey supported their belief that consumers read Consumer Reports for entertainment rather than for product information. Dr. Colston Warne, the chairman of CU's board of directors, told Dr. Bose that the readers of Consumer Reports "love to read about vermin hair in Campbell soup (J.A. 75-76)." The desire to inject a little "sarcasm" and "spice" is another possible motivation for Seligson's attribution of grotesque qualities to the Bose 901.

Thus although the Court has found that Seligson's patent did not motivate him to downgrade the Bose 901, the Court cannot justifiably say that there was no possible reason for Seligson to disparage the Bose 901. Consequently, the Court will not indulge the inference, suggested by the defendant, that because there was not motivation to disparage, there could be no actual malice (App. X136-138) (footnote omitted).

After stating, "CU's editorial

procedures reveal no evidence of actual malice (App. X32)," the Court of Appeals summarized the editorial procedures. This summary was based on the testimony of respondent's Technical Director Monte Florman whose testimony had been found to be "wholly untrustworthy and . . . not credible" by the District Court (App. X163 n.33). Compare App. X32-34 with J.A. 197-99).

The "associate technical director" referred to by the Court of appeals was Florman (J.A. 196). Prior to trial Florman was promoted to technical director (J.A. 195).

Both the Technical director then, Karl Nagel, and Florman, then associate technical director, reviewed the Article (J.A. 129-30). Florman testified that he never asked Seligson what he had heard after Dr. Bose said on June 3, 1970, that

the wandering instruments were a scientific impossibility (J.A. 213-14).

Both Seligson and Dr. Green, respondent's psychoacoustic expert, testified that they were unaware of any technical literature which referred to a musical instrument which appeared to a listener to wander about the room when its sound was played through a loudspeaker (J.A. 192-93, 317-20).

The Court of Appeals said:

> Even though we accord relatively little weight to CU's claims of good faith and lack of any motivation to disparage the Bose 901, we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not. The evidence presented merely shows that the words in the Article may not have described precisely what the two panelists heard during the listening test. CU was guilty of using imprecise language in the Article--perhaps resulting from an attempt to produce a readable article

> for its mass audience. Certainly this does not support an inference of actual malice (App. X34-35).

There had been no evidence that Seligson wrote the false and disparaging statement in "an attempt to produce a readable article for its mass audience." The District Court said that the Article contained respondent's evaluation on the quality and performance of the loudspeakers based on respondent's tests of them (App. X46).

The District Court found that the failure of respondent to describe "precisely what the two panelists heard during the listening test" resulted in a "statement that attributes such grotesque qualities as instruments wandering about the room to the plaintiff's product [that] could have no effect other than to harm the reputation of the product (App. X105)." (footnote omitted).

The District Court found that what the two panelists testified they heard, movement along the wall between two loudspeakers, is a common expected effect with all stereo loudspeaker systems when present in the stereo recording process (App. X101).

The Court of Appeals did not mention the rulings of the District Court on the credibility of respondent's witnesses Seligson (App. X142), or Florman (App. X163 n.33), under the heading "Our Review (App. X15-36)." Under the heading "The Findings of the District Court (App. X8)," it did state that the District Court "found that Seligson's testimony as to what the words 'about the room meant' was not credible (App. X14)."

On November 14, 1982, petitioner filed a petition for rehearing, suggesting that it be *en banc*. In denying the

petition for rehearing suggesting a rehearing *en banc*, the Court of Appeals said:

> The petition for rehearing is denied. As to the issue of "actual malice," the appellee misreads and mischaracterizes our opinion. We did not focus on the state of mind of the editorial staff; we focused on the state of mind of Seligson (author) and the editorial staff which reviewed and modified Seligson's report.
>
> As to the second point raised by appellees, we think the standard of review as set forth on page 12 of the slip opinion [not limited to the clearly erroneous standard of FED. R. CIV. P. 52(a)] is correct and was properly applied. Order of November 23, 1982 (Pet. 22-23).

Summary of the Argument

It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). *Inwood Laboratories, Inc. v.*

Ives Laboratories, Inc., 456 U.S. 844, 72 L. Ed. 2d 606 (1982). Rule 52 does not make exceptions or purport to exclude any categories of factual findings from the obligation of a Court of Appeals to accept a District Court's findings unless clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). The "clearly erroneous" rule applies when the district court makes findings of fact on intent in order to apply the governing constitutional law and determine whether the plaintiff has met its burden of proof. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) and 443 U.S. 526, 534 n.8 (1979); see *Mayor v. Educational Equality League*, 415 U.S. 605, 621 n.20 (1974). An appellate court examining the trier's findings with the extra care required in First Amendment cases is bound by the trier's finding of knowing falsity

or reckless disregard for the truth when there is sufficient evidence to support the material findings, regardless of the appellate court's agreement with such finding. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3791, 3792 (U.S. Apr. 18 and 19, 1983) (Nos. 82-1719, 82-1740).

There was ample evidence to support the District Court's finding that petitioner had proved by clear and convincing proof that the publication of the false and disparaging statement was not made in good faith. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The District Court found that Seligson knew at the time the Article was published that the false and disparaging statement did not accurately describe what he and Lefkow observed (App. X142-43). The District

Court found that Seligson's testimony to the contrary was not credible, based on his testimony and demeanor (App. X142).

Other evidence supported this finding. Respondent refused to demonstrate that instruments heard through the Bose system tended to wander about the room in the June 1970 meeting where Dr. Bose twice requested a demonstration (J.A. 67-71), and Seligson testified he could have set up a demonstration in half an hour (J.A. 139). Respondent refused to identify any stereo record used in the "special listening tests" on which the false and disparaging statement was based despite a promise by Seligson to identify these stereo records (J.A. 71, A394-95). Respondent failed to conduct and record comparative tests on observations of instruments heard through conventional stereo speakers of the same stereo

recordings heard through the Bose speakers (PX9, J.A. 339-40). Such tests would have attributed any wandering observed to the stereo records, not the Bose speakers (J.A. 52-57).

The only other "individual" instrument and Lefkow reported hearing during the several-hour "special listening test" was a piano that they observed remained stationary (J.A. 148, 159, 244). It was false to state, "Worse, individual instruments heard through the Bose system . . . tended to wander about the room," when Seligson and Lefkow testified hearing only sounds of a single instrument move between left and right speakers(J.A. 148, 159, 244), a common effect in stereo speaker systems (App. X101, J.A. 52-57, 234-36, 312-14, 325-26).

By rejecting the trial judge's findings on the credibility of witnesses

and relying on testimony which the trial judge found to be not credible, the Court of Appeals deprived petitioner of property without due process of law. U. S. Const. Amend. V. Petitioner's right to obtain judicial relief for the harm caused by respondent's publication of the false and disparaging statement is a property right of which petitioner cannot be deprived without due process of law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Due process requires that an appellate court follow the directions in FED. R. CIV. P. 52 for deference to trial court judgment on the credibility of witnesses. The Court of Appeals deprived petitioner of a judgment against respondent by ignoring key findings by the trial judge that the testimony of Seligson on his knowledge of

falsity at the time of the publication was not credible (App. X142) and that Florman's testimony was "wholly untrustworthy" and "not credible (App. X163)."

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny did not abrogate the requirement of Rule 52 that findings of fact cannot be set aside on appeal unless clearly erroneous. The rationale for justifying a special standard of proof for "hot news" publications like *The New York Times* and TIME, *Time, Inc. v. Pape*, 401 U.S. 279 (1971), may be the limited ability of a daily newspaper or weekly news magazine under the pressure of deadlines to verify the accuracy of published statements based on information furnished by others. Here respondent published the false and disparaging statement written by its own engineer based on a "special listening

test" he and another engineer conducted in its own laboratories in January, 1970, about three months before publication in April 1970. Neither *New York Times* nor its progeny purported to usurp for appellate court judges, who do not hear witnesses testify, the right to ignore findings by trial court judges, who actually see and hear the witnesses testifying, on the demeanor and credibility of witnesses. "The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Argument

I. IT IS SETTLED THAT FED. R. CIV. P. 52(a) REQUIRES THAT FINDINGS OF FACT NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS EVEN WHEN CONSTITUTIONAL RIGHTS ARE ASSERTED.

It is well settled that in all actions tried upon the facts without a jury, "Findings of fact shall not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a). *E.g. Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 72 L.Ed.2d 606 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

In *Pullman-Standard* the Court said:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. 456 U.S. at 287.

In *Inwood* the Court further explained:

> That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. . . . Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," . . . it

> must accept the trial court's findings. (footnote omitted) 72 L.Ed.2d at 616, 456 U.S. at 855-56.

In contrast, in the present case the Court of Appeals said:

> In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a); instead, we must perform a de novo review, independently examining the record to insure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof (App. X22-23).

This Court, however, has held that the "clearly erroneous" rule applies even when constitutional rights are asserted under the equal protection clause of the Fourteenth Amendment. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (Dayton I) and 443 U.S. 526, 534 n.8. (1979) (Dayton II). See *Mayor v. Educational Equality League*, 415 U.S. 605, 621 n.20 (1974).

In *Dayton I*, dealing with findings of fact related to intentional segregation of

school children, the Court said:

> On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed Rules Civ Proc 52(a). 433 U.S. at 417.

In *Dayton II* the Court said:

> We have no quarrel with our Brother Stewart's general conclusion that there is great value in appellate courts showing deference to the fact-finding of local trial judges. Ante, at 470-471. The clearly erroneous standard serves that purpose well. 443 U.S. at 534 n.8.

There is no logical distinction between review of a finding of publication in bad faith, made here by the "finder of fact [who] must determine whether the publication was indeed made in good faith," *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (involving a First Amendment claim), and review of a finding on intentional discrimination by the finder of fact in *Dayton* and *Mayor*

(involving Fourteenth Amendment claims). The "clearly erroneous" standard serves the purpose of recognizing that appellate courts must show deference to the fact finding of local trial judges regardless of what type of litigation is involved. *Dayton II*, 433 U.S. at 534 n.8. An appellate court examining the trier's findings with the extra care required in First Amendment cases is bound by the trier's finding of knowing falsity or reckless disregard for the truth when there is enough evidence to support the material findings, regardless of the appellate court's agreement with such finding. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *petitions for cert. filed*, 51 U.S.L.W. 3791, 3792 (U.S. Apr. 18 and 19, 1983) (Nos. 82-1719, 82-1740).

Adherence to the clearly erroneous

standard is particularly required here where the lack of credibility of Seligson as a witness was crucial to the finding by the District Court that respondent published the false and disparaging statement in bad faith because Seligson, the author of the statement, knew that the "panelists" [Seligson and Lefkow] did not hear individual instruments through the Bose system that "tended to wander about the room."

The appellate court judges did not hear or see a witness testify, and could not observe the "look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration . . .," *United States v. Raddatz*, 447 U.S. 667, 679 (1980), which a trial judge observes while listening to and watching a witness testify for days

under direct and cross examination. In this case witness Seligson testified on six trial days, and his testimony is recorded on 593 pages (Tr. 6-111 to 6-168, 7-2 to 7-129, 8-4 to 8-65, 9-2 to 9-158, 10-2 to 10-150, 11-2 to 11-42). That transcript was condensed to only 96 pages in the Record Appendix before the Court of Appeals (A104-99). These cold pages cannot record for the reviewing appellate judges the impressions on credibility the trial judge received while actually watching and listening to Seligson testify, which influenced the District Court to rule on Seligson's knowledge of the falsity of the false and disparaging statement that, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

Manifestly, the District Court was correct in relying on *St. Amant v. Thompson*, 390 U.S. 727 (1968) (App. X139) and focusing on the knowledge of falsity by Seligson because he was one of the two "panelists," wrote the false and disparaging statement, and repeatedly reviewed it for accuracy (App. X140, X168 n.44). *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974).

While the Constitution requires that all federal judges serve so long as they maintain good behavior with undiminished compensation, there is a constitutional requirement for appointment with the advice and consent of the Senate only for justices of this Court. Recognizing the wisdom of this policy, Congress has by statute required the same selection process for judges in the lower federal courts. 28 U.S.C. §§ 44(a), 133.

The policy behind these requirements for appointing federal judges is to insure the competence and fairness of all members of the federal bench. These standards for federal judges create confidence in litigants that the federal judge before whom they appear will fairly resolve factual disputes based on evidence presented in open court through witnesses who swear to tell the truth and are subject to probing cross examination, to help the trial court judge determine the credibility of each witness by observing the witness with ears and eyes.

No appellate judge has such an opportunity to judge witness's credibility or can derive it from a review of the cold transcript of what is said, that fails to preserve the visible and aural impressions perceived by the trial judge at the time the testimony is given. Only the trial

judge who actually heard a witness testify can use the transcript (and notes that may be taken while the witness testified) to refresh those impressions when making findings of fact. That is an important reason why Rule 52 binds an appellate court to accept findings of fact by the trial judge unless clearly erroneous. *United States v. Raddatz*, 447 U.S. 667, 697 n.3 (1980) (Marshall, J., dissenting). This Court and federal appellate courts have followed this rule for nearly half a century. The settled authority and the logic behind it requires reversal of the ruling by the Court of Appeals, that "In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) . . . (App. X22)."

II. THE FINDINGS BY THE DISTRICT COURT THAT AUTHOR SELIGSON KNEW AT THE TIME OF THE PUBLICATION OF THE ARTICLE THAT THE FALSE AND DISPARAGING STATEMENT DID NOT ACCURATELY DESCRIBE THE EFFECTS THAT HE AND LEFKOW HEARD DURING THE "SPECIAL LISTENING TEST" AND THAT HIS TESTIMONY TO THE CONTRARY WAS NOT CREDIBLE AND THE OTHER EVIDENCE SUPPORT THE FINDING THAT PETITIONER PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT PUBLISHED THE FALSE AND DISPARAGING STATEMENT WITH "ACTUAL MALICE."

The Court of Appeals expressly ruled that the statement found damaging to petitioner was disparaging, and assumed that the statement was both factual and false (X19-21). The evidence abundantly supports that assumption. *Supra* 9-15. We therefore turn to the clear and convincing evidence supporting the District Court's finding that respondent published the false and disparaging statement with knowledge that it was false or with reckless disregard of its truth or falsity (App. X142-43).

The testimony of Seligson in and of

itself is clear and convincing proof that he knew that the words "Worse, individual instruments heard through the Bose system . . . tended to wander about the room" in the false and disparaging statement did not accurately describe the effects he and the other "panelist," Lefkow, testified they heard during the "special listening test." Seligson is an engineer with over 25 years of experience in testing loudspeakers and received a patent on his own loudspeaker invention at the time he was supervising the tests for the Article (App. X51-52, X61-63). Seligson selected as "panelists" himself and Lefkow, an engineer with a masters degree in electrical engineering from Columbia (X52), as most suitable to make the observations for "the special listening test (J.A. 97)." Engineers are expected

to accurately describe their observations of tests in their technical reports. The District Court found, "Seligson is an intelligent person whose knowledge of the English language cannot be questioned (App. X142)." That finding is amply supported by the proficiency in the use of the English language Seligson demonstrated during his testimony on six trial days on direct, cross, redirect and recross (A104-99, Tr. 6-111 to 11-42). The conclusion is inescapable that Seligson knew when he wrote the original report to editorial (PX10, App. X155, X161) and reviewed the final proof of the Article for accuracy (J.A. 145) that the words "Worse, individual instruments heard through the *Bose* system . . . tended to wander about the room" did not describe what he and Lefkow testified they observed -- movement between the left and right

speakers, as commonly heard through any stereo speaker system as a natural consequence of the stereo recording process (App. X101).

There was thus clear and convincing evidence in the record to support the finding of the District Court, "It is simply impossible for the Court to believe that he [Seligson] interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning (App. X142)."

To put it directly, the District Court found that Seligson lied when he wrote the false and disparaging statement in February 1970, lied to Dr. Bose in June of 1970 when he said all the "panelists" heard the instruments wandering "out into the room" (J.A. 64-65) and lied under oath at trial in 1980 when he told the District Court he believed the Article

accurately described what he and Lefkow testified they observed.

It can hardly be doubted that respondent through author Seligson, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974), knew of the falsity. See *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

Other evidence supports the finding that petitioner proved actual malice with clear and convincing proof. Although the Article represented that respondent merely repeated the "cricket" experiment comparing the Bose system with two others and only substituting "a variety of stereo records" for the "special tape . . . of a cricket-like noisemaker moving from extreme left to extreme right" made by respondent's engineers in an anechoic chamber (App. X48), the "special listening test" panel was different from the "cricket" panel (App. X70-71), the special

listening test "panel" tested only the Bose system (J.A. 227, 240), and respondent has never identified even one of these stereo records (App. X194, A394-95), although Seligson promised Dr. Bose he would identify them (J.A. 71).

Lefkow testified that when listening to records played through the Bose 901 system on November 24, 1969, he heard no instruments tending to wander about the room (J.A. 238. Lefkow testified as follows on cross-examination:

> Q With stereo speakers you would expect that, at times, the sound would come from various points between the speakers?
>
> A If that was what was intended.
>
> Q Now, that would happen with any good quality brand of speakers, wouldn't it?
>
> A Again, if the recording had the information contained (J.A. 235-36).

Yet the two "panelists" Seligson and Lefkow made no tests to determine if the

sound coming from various points between the two Bose speakers that they testified observing during the "special listening test" was caused by "the recording . . . [having] the information contained." As engineers knowledgeable in stereo loudspeakers, both Seligson and Lefkow knew that it was normal for the sound to come from various points between the left and right speakers when listening to stereo recordings. If, as they testified, they observed violin sounds moving back and forth between the left and right Bose speakers, they must have known that this movement was caused by information contained in the stereo recording. They readily could have confirmed that the stereo record, not the Bose loudspeakers, was the cause of the observed movement between speakers, by playing the same stereo record through conventional

speakers and observing the same movement (J.A. 52-57).

It was reckless for respondent to report, "Worse, individual instruments heard through the Bose system tended . . . to wander about the room," when the author Seligson knew that he and Lefkow observed only movement between the Bose speakers which they also would have observed had they made the simple test of playing the same stereo recordings through a pair of conventional stereo speakers.

The failure of respondent to identify even one of the stereo recordings claimed to have been used in the "special listening test" (App. X194) is another piece of evidence in the clear and convincing proof of actual malice. The laboratory project notebook (PX9, J.A. 97-103, 232-33) represented as recording the results of the "special listening

test," failed to identify even one of the stereo test records while recording that the two "panelists" listened to the Bose speakers for several hours.

This failure, especially after Seligson promised on June 3, 1970, to identify these stereo recordings to Dr. Bose (J.A. 71), supports a conclusion that Seligson knew that he could not identify any stereo records which would produce wandering effects through Bose speakers different from those produced through conventional speakers.

Seligson used the word "instruments" in the false and disparaging statement although the only "individual instruments" identified in the "special listening test" were the violin and piano, and both Seligson and Lefkow testified that they observed only violin sounds wandering between the speakers. They testified that the piano

sounds did not move (J.A. 148, 159, 244). They identified no other instruments heard during the "special listening test." Respondent was reckless in ascribing "wandering about the room" to "instruments heard through the Bose system" when its engineers claimed to have observed movement between the speakers of only one of the two individual instruments they claimed to have heard in several hours of listening. No responsible engineer would have written or approved the false and disparaging statement without listening to recordings of a number of instruments and eliminating the stereo record as the source of any observed wandering by listening to the same stereo record through a conventional pair of stereo speakers.

Respondent could have conducted listening tests with a panel of twelve young

music students as Seligson represented respondent used for listening tests in the 1969 article in *Stereo Review* (PX6) to check on the observations of two "panelists" Seligson and Lefkow. Seligson knew that no unbiased panel would have observed the grotesque effects attributed to the Bose system in the false and disparaging statement.

We submit that no proof of "actual malice" could be more clear or convincing than the testimony of the two "panelists" whose observations were used as the basis for the false and disparaging statement -- electrical engineers knowledgeable on stereo speakers -- that what they observed was not what the Article reported they heard, and the admission by the author of the statement that he knew it (J.A. 124). *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-54 (1974). Surely representing

that, "Worse, individual instruments heard through the Bose system . . . tended to wander about the room" with no basis for it is the making of a false and disparaging statement with reckless disregard for its truth or falsity.

III. BY REJECTING THE TRIAL JUDGE'S FINDINGS ON THE CREDIBILITY OF WITNESSES AND RELYING ON TESTIMONY WHICH THE TRIAL JUDGE FOUND TO BE NOT CREDIBLE, THE COURT OF APPEALS HAS DEPRIVED THE PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The provision in Federal Rule of Civil Procedure 52(a) that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" is more than an arbitrary or convenient rule of procedure. The requirement for deference to trial court judgment on the credibility of witnesses embodies a fundamental aspect of the Fifth Amendment requirement that "No person shall . . . be

deprived of . . . property, without due process of law."

The right of petitioner to obtain judicial relief for the harm done to it by respondent's publication of the false and disparaging statement is a property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Petitioner may not be deprived of that property right without due process of law.

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

It is essential to the concept of Due Process of Law that the trier of the facts, whether judge or jury, determine the credibility of those witnesses who appear and testify in court.

Due Process of Law requires that a

party be afforded the opportunity for cross-examination of the witnesses who appear before the trier of the facts. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Pointer v. Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. 380 U.S. at 405.

Chambers and *Pointer* were criminal cases, but the same principle is no less applicable to civil actions. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (termination of welfare benefits); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959) (denial of security clearance). For example, in *Goldberg* the Court observed that:

> In almost every setting where important decisions turn on questions of fact, due process

> requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S. at 269.

A primary purpose of cross-examination, and perhaps the most important purpose of cross-examination, is to aid the trier of facts in assessing the credibility of the witnesses.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

> It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

The demeanor of the witness while testifying may be crucial as to his credibility. Listening to an electronic recording of oral testimony is not equivalent to observing the witness as he testifies. *Wingo v. Wedding*, 418 U.S. 461, 473-474 (1974).

> Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. *United States v. Raddatz*, 447 U.S. 667, 696 (1980) (Marshall, J., dissenting).

Therefore an appellate court must not disregard the findings of the trial judge who had the opportunity "to judge of the credibility of the witnesses."

> "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded . . . ." *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952), quoting with approval from *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930).

Just as the provisions of FED. R. CIV. P. 37 ". . . must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law," *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), so must the provisions of Rule 52(a) relating to the credibility of

witnesses be followed by a Court of Appeals in order that a party shall not be deprived of property without Due Process of Law.

When an appellate court rejects the findings of the trial judge on issues of the credibility of witnesses who were seen and heard by the trial judge, and instead arrives at its own conclusions as to the facts on the basis of "the cold record," *United States v. Raddatz*, 447 U.S. 667, 679 (1980) -- or, worse, overturns a judgment on the basis of testimony which the trial judge found to be not credible -- the party in whose favor the judgment was entered is deprived of property rights without due process of law.

That is precisely what happened in the present case.

Seligson and Lefkow, the two CU engineers who constituted the "panel" for

the "special listening test," testified that the only "wandering" of an instrument which they heard was the apparent movement of violin sounds (J.A. 148, 172, 231) between the two Bose 901 loudspeakers (J.A. 124, 156-59, 244-46) or along the wall immediately behind and between the two speakers (J.A. 123, 253; PX29, J.A. 170-71, 342; PX35, J.A. 257-58, 343).

Lefkow admitted that it is common for the sound to come from various points between two stereo loudspeakers (J.A. 234-35), and both Dr. Bose (J.A. 52-57) and CU's expert witness, Dr. Green (J.A. 312-14, 325-26) agreed.

Seligson testified that on the basis of the "special listening test" (J.A. 102-03) he wrote the draft report to editorial (J.A. 126, 145) which said, "Instruments . . . appeared to suffer from

. . . a tendency to wander around the room" (PX10, App. X155, X161) and then approved the slightly revised wording (J.A. 145), "Worse, individual instruments . . . tended to wander about the room."

The trial judge naturally concluded that what Seligson wrote did not describe what he and Lefkow had heard (App. X103-104).

Seligson testified that the language in the Article was intended to describe what he and Lefkow had heard (J.A. 123, 124, 147, 169), but the District Court judge expressly found:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)."

The Court of Appeals ignored this express finding with respect to the credibility of Seligson (or the lack thereof) and, in effect, found Seligson's testimony

on this point to be credible and convincing (Compare App. X34-35 with X141-42).

The Court of Appeals found further support for its conclusions in evidence of how the "associate technical director" of CU construed the language in issue when he reviewed Seligson's draft to editorial (App. X33-34). The Court of Appeals did not identify the "associate technical director" by name, but it was Monte Florman (J.A. 196), and the evidence about review by the associate technical director on which the Court of Appeals relied was testimony of Florman. Compare App. X33-34 with J.A. 198-199, 214-219.

The District Court judge had found expressly that "Florman's testimony is wholly untrustworthy and is not credible (App. X163)."

Thus the Court of Appeals has deprived petitioner of a judgment against

respondent by making a "de novo review" (App. X22) of the record and finding an absence of "actual malice" on the basis of the testimony of Seligson, which the trial judge found to be "not credible" (App. X142), and the testimony of Florman, which the trial judge found to be "wholly untrustworthy" and "not credible" (App. X163).

By adopting such an approach to its review of the decision of the District Court, the Court of Appeals not only violated the requirements of FED. R. CIV. P. 52(a) but, worse, deprived petitioner of property without Due Process of Law in violation of the Fifth Amendment.

IV. NOTHING IN NEW YORK TIMES OR ITS PROGENY ALLOWS THE COURT OF APPEALS TO IGNORE THE REQUIREMENTS OF RULE 52(a).

The Court of Appeals cited *New York Times v. Sullivan*, 376 U.S. 254 at 285 & n.26 and *Time, Inc. v. Pape*, 401 U.S. 279,

284 (1971) in support of its proposition that it was not limited to the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) (X22-23).

New York Times did not consider Rule 52(a), but involved review of a jury trial. After stating, "We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression,[26]", this Court explained in note 26 that the Seventh Amendment provision that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," did not preclude such an independent review because "its ban on re-examination of facts does not preclude us from determining whether governing rules of

federal law have been properly applied to the facts." 376 U.S. at 285 n.26.

Time also involved a jury trial and did not mention Rule 52(a). The Court ruled on the propriety of a directed verdict for Time which, of course, requires viewing the evidence presented in the light most favorable to the plaintiff. *E.g., Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 696 (1962) and authorities cited in n.6.

The Court said in *Time*:

> The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule [requiring proof of actual malice] to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." 401 U.S. at 284 (Emphasis added).

In the evidentiary review which followed there was no dispute on the facts. The Court said, "The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to an indeterminate financial liability." 401 U.S. at 291. In concluding its opinion with a cautionary note that the decision was based on the specific facts of the case, involving a news report of a particular government publication, the Court quoted with approval the following statement from *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968):

> "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true

ones." 401 U.S. at 292.

The rule first annunciated in *New York Times* restricted the liabilities of those who utter defamatory falsehoods regarding public officials. The Court there recognized that because "erroneous statement is inevitable in free debate," 376 U.S. at 271, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct." *Id.* 273. But the Constitution does not grant absolute immunity to anyone, whether the news media or not, who libels a public official, nor has the Court ever concluded that the usual processes of law are inadequate for dealing with this kind of litigation. The Court decided that the substantial First Amendment interests implicated in any libel suit against a public official would be adequately served by a constitutional

rule that subjects a false and disparaging statement to the sanctions of the common law of libel only where it was uttered "with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* 280. The Court "has made it clear that 'actual malice' is not to be equated with spite, ill will, intention to harm, or the like." Annot., 61 L.ed. 2d 944, 995 (1980) and cases cited.

The District Court discussed the progeny of *New York Times*, saying the Court extended the constitutional privilege to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and to a private individual involved in an event of public or general concern in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and reverted to a status-based test in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)

(App. X109-10). The District Court then ruled that the *New York Times* actual malice standard applies to product disparagement cases and that petitioner, a corporation, was a "public figure" and required to show, by clear and convincing proof, that the false and disparaging statement was published by respondent with the knowledge that it was false or with reckless disregard of its truth or falsity (App. X111-33). Whatever validity that analysis may have for imposing stringent standards of proof of actual malice upon petitioner at trial, see generally Annot., 61 L.ed. 2d 944 (1980), it is unfair to deprive a damaged plaintiff, who *has* proven actual malice by clear and convincing proof, of a recovery from a lying defendant by allowing an appellate court to independently make its own findings of fact untrammelled by the

"clearly erroneous" standard of Rule 52(a) or findings on credibility by the trial judge.

There may be some justification for relaxing the standards of care for veracity imposed on "hot news" publications commenting on public officials and governmental publications as in *New York Times* and *Time*, by a daily newspaper and weekly news magazine, respectively, reporting upon information received from others. These publications often have little time to conduct a thorough review of a disparaging statement because of approaching deadlines for a "hot news" story paraphrasing or condensing information received from others.

Respondent did not report "hot news" based on information or publications of others. It published a report on tests

conducted by its own expert engineers and technicians begun more than five months before publication, and published the false and disparaging statement, knowing it to be false, based on the "special listening test" allegedly conducted nearly three months before publication.

Since respondent published what it represented to the public was a report based on carefully controlled tests by its expert engineers and the supervising engineer actually wrote the false and disparaging statement, there is no policy justification for expanding the constitutional privilege requiring "clear and convincing proof" of actual malice to disregard the "clearly erroneous" standard of appellate review and set aside the trial judge's findings of fact on the basis of clear and convincing proof.

Since petitioner proved actual malice

by clear and convincing proof, it was unnecessary for the District Court to rule on whether the *New York Times* actual malice standard applies to product disparagement cases. The District Court assumed that in this product disparagement action

> we are concerned with the manufacturer's interest in the reputation of its product, an interest not nearly as significant as an individual's interest in his personal reputation and hardly "at the root of any decent system of ordered liberty." Damage to a product's reputation, unlike damage to the reputation of an individual, can always be measured in terms of monetary loss. Moreover, a manufacturer almost always has access to the channels of communication that can be used to refute disparaging comments about its product (App. X115-16).

There are a number of fallacies in that reasoning. The enormous power which respondent has in the marketplace can damage the business of the manufacturer to such an extent that the manufacturer has no financial resources necessary to obtain

vindication in the courts. Dr. Bose testified about a person who lost his company because of a report in respondent's magazine (A392).

The resultant loss of sales means lost jobs to those employees engaged in the manufacture and sale of the disparaged products. The livelihood of workers of modest means is, we submit, at least as important as the personal reputation of a person defamed.

Furthermore, the manufacturer does not have access to the channels of communication to the millions of consumers who rely upon respondent's representation that "CU pledges that any opinions entering into its ratings of products shall be as free of bias as it is possible to make them (App. X144)." The Magazine Publishers Association of America and the publishers of the *Wall Street Journal* and

Barron's supported respondent with amicus curiae briefs in the court below. It is unrealistic to expect these publications to afford petitioner a channel to inform consumers of the respondent's breach of their trust by falsely disparaging the Bose system.

The primary function of our legal system is to establish rules for governing the prelitigation conduct of citizens so as to avoid litigation and lead to amicable resolution of disputes consistent with traditional concepts of fair play and substantial justice. A rule of law subjecting a plaintiff, who has proved at trial by clear and convincing evidence that a publisher published a false and disparaging statement with knowledge of its falsity or reckless disregard of its truth or falsity, to another extraordinary burden on appeal, does not foster the

policies of the First Amendment. Such a rule only condones irresponsible publishing practices and provides no incentive for a publisher to monitor for truth or to promptly print retractions when false and disparaging statements are made.

The rule we urge here of maintaining the clearly erroneous standard of review and applying conventional rules of law to a magazine that prints the results of tests conducted by its own engineers furthers the true spirit of the First Amendment. That true spirit fosters responsible publishing by encouraging publishers to monitor their publications for accuracy, to promptly print retractions of false statements and to condemn lying, of which the District Court found respondent guilty here by clear and convincing proof.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, with instructions to reinstate the District Court judgment for petitioner on liability and to conduct its review of the findings on damages in conformity with the "clearly erroneous" standard of Rule 52(a).

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IN THE

Supreme Court of the United States

October Term, 1983

BOSE CORPORATION,

Petitioner,

against

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT

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Question Presented

Was the Court of Appeals in this product disparagement suit brought by a conceded public figure precluded by Fed. R. Civ. P. 52(a) from exercising independent judicial judgment to determine for itself whether the district judge sitting without a jury had properly applied the actual malice standard, when:

(i) this Court has held since New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964), that appellate courts in public figure defamation actions are required to make an independent examination of the entire record to determine if "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands;" and

(ii) the Court of Appeals accepted

the trial judge's findings on underlying events and did not redetermine any disputed facts; and

(iii) the District Court based its findings upon an erroneous view of the law: it applied a reasonable belief criterion, inferred actual malice from the purported falsity alone and effectively held Consumers Union to strict liability because it is a responsible publisher having an intelligent staff which ergo is not capable of committing honest error; and

(iv) actual malice is an ultimate fact which has long been held not to be subject to the "clearly erroneous" rule; and

(v) the record permits only one rational conclusion: the firm and definite conviction that the district judge committed error?

Table of Contents

Page

Question Presented i

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Summary of the Argument 37

Argument

Point I: 42

The Independent Appellate Review Carried Out by the Court of Appeals to Determine Whether the Constitutional Actual Malice Standard was Properly Applied is a Substantive Right Unaffected by a Rule of Civil Procedure

Point II: 62

As the District Court's Determination on Actual Malice was Based on an Error of Law, It is Not Subject to Rule 52(a) and was Properly Reversed by the Court of Appeals

Point III: 77

The Court of Appeals Properly Exercised Independent Review Because the Determination of Actual Malice is an Ultimate Fact Involving Both Law and Fact Issues

Point IV: 88

The District Court's Finding of Actual Malice is Clearly Erroneous

Conclusion 106

Table of Authorities

Cases

Addington v. Texas, 441 U.S. 418 (1979).....82-83, 101, 104

Baldine v. Sharon Herald Co., 391 F.2d 703 (3d Cir. 1968).....54

Baumgartner v. United States, 322 U.S. 665 (1944).....40, 79-82, 87

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).....48

Berry v. National Broadcasting Co., 480 F.2d 428 (8th Cir. 1973), cert. dismissed, 418 U.S. 911 (1974).....55

Bogardus v. Commissioner, 302 U.S. 34 (1937).....85

Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970).....100

Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981).....54

Briarcliff Lodge Hotels, Inc. v. Citizens-Sentinental Publishers, Inc., 260 N.Y. 106, 183 N.E. 193 (1932).....72

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).....29

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977).....52

Commissioner v. Duberstein, 363 U.S. 278 (1960).....85, 106

Connick v. Myers, ___ U.S. __, 51 U.S.L.W. 4436 (Apr. 20, 1983).....52

In re Consumers Union of United States, Inc., 7 Media L. Rep. (BNA) 2038 (S.D.N.Y. 1981).....3

Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., 314 F. Supp. 697 (D. Conn. 1970).....3

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)...43, 48, 74

Davis Co. v. United Furn. Workers, 674 F.2d 557 (6th Cir.), cert. denied, 103 S. Ct. 296 (1982).....53-54

Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952).....103

Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107 (7th Cir.), cert. denied, 434 U.S. 966 (1977).....55

Garrison v. Louisiana, 379 U.S. 64 (1964).....39, 65, 68, 72-74

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).....29, 39, 43, 63-64

Glasson v. Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975).....54

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).....48, 65, 71, 74

Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971).....53

Haynes v. Washington, 373 U.S. 503 (1963).....58-59

Helvering v. Rankin, 295 U.S. 123 (1935).....85

Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1937).....84-85

Herbert v. Lando, 441 U.S. 153 (1979).....63

Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977).....54

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 884 (1982).....62-63

Janigan v. Taylor, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965).....103

Lisenba v. California, 314 U.S. 219 (1941).....56

Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980).....71

Loeb v. New Times Communications Corp., 497 F. Supp. 85 (S.D.N.Y. 1980).....76

Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980), cert. denied, 449 U.S. 1083 (1981).....54

Miller v. California, 413 U.S. 15 (1973).....53

Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573 (1951).....103

National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).....71

New York Times Co. v. Sullivan, 376 U.S 254 (1964).....passim

Nishikawa v. Dulles, 356 U.S. 129 (1958).....103

NLRB v. Gotham Industries, Inc., 406 F.2d 1306 (1st Cir. (1969).....103

Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980).....52-53

Pierce v. Capital Cities Communications, Inc., 576 F.2d 495 (3rd Cir.), cert. denied, 439 U.S. 861 (1978).....54

Pullman-Standard v. Swint, 456 U.S. 273 (1982).....38, 62, 85-86, 106

Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977).....76

Rosenblatt v. Baer, 383 U.S 75 (1966).....48, 65

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).....47, 65

Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980).....54

St. Amant v. Thompson, 390 U.S. 727 (1968).....39, 48, 64, 65, 66, 68

Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686 (6th Cir. 1981).....54

Schneiderman v. United States, 320 U.S. 118 (1943).....79

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980).....3

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975).....101

Sumner v. Mata, 449 U.S. 539 (1981).....82

Tilton v. Cowles Publications Co., 76 Wash. 2d 707, 459 P.2d 8 (1969), cert. denied, 399 U.S. 927 (1970).....76

Time, Inc. v. Pape, 401 U.S. 279 (1971).....35, 46, 51, 65, 75, 84

Towne v. Eisner, 245 U.S. 418 (1918).....100

United States v. Appalachian Power Co., 311 U.S. 377 (1940).....86-87

United States v. General Motors Corp., 384 U.S. 127 (1966).....85

United States v. United States Gypsum Co., 333 U.S. 364 (1948).....85, 89-91

Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975).....55

Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).....3

Watts v. Indiana, 338 U.S. 49 (1949).....60-61

Wood v. Georgia, 370 U.S. 375 (1962).....59

Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932 (2d Cir.) cert., denied, 449 U.S. 839 (1980).....3, 101

Constitutional Provisions

U.S. Const., Amend. 1.....passim

U.S. Const., Amend. 7.....49, 50, 90

Statutes

15 U.S.C. § 1125(a) (1976).....8

Federal Rules

Fed. R. Civ. P. 52(a).....passim

Other Authorities

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T. Emerson, The System of Freedom of Expression (1970).....49

Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191.....43, 46

Note, Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?, 52 St. John's L. Rev. 68 (1977).....90

Oakes, Proof of Actual Malice In Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655 (1979).....49

Restatement (Second) of Torts § 580A comment g (1977).....49

Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199 (1976).....49

R. Sack, Libel, Slander, and Related Problems (1980).....49, 76

No. 82-1246

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,

Petitioner,

- against -

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

BRIEF FOR RESPONDENT

Statement of the Case

The respondent in this twelve-year old product disparagement suit is Consumers Union of United States, Inc. (hereinafter "respondent," "Consumers Union," or "CU"), the highly-respected

nonprofit, independent consumer testing organization, which for forty-seven years has published the monthly magazine, CONSUMER REPORTS. As both the District Court and the Court of Appeals found (App. X4, 45),[1] CU and CONSUMER REPORTS had at the time of publication of the disputed review "a very favorable reputation for independence, integrity,

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1. Reference to the separate Appendix filed with the Petition for a Writ of Certiorari containing the opinions of the lower courts is to "App." followed by "X" and page numbers. Reference to the Joint Appendix filed in this Court is to "J.A." and page numbers. Reference to the Appendix in the Court of Appeals is to "A." and page numbers. Reference to the transcript of the trial of liability issues is to "LTr." and page numbers. Reference to petitioner's and respondent's exhibits is to "PX" numbers and "DX" letters, respectively.

accuracy, and freedom from bias."[2]

2. This well-deserved reputation continues to the present. CU has approximately one hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.7 million. CU's consistent efforts to provide consumers with truthful and independent judgments on goods and services in the consumer marketplace have been recognized by the courts. See Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., 314 F. Supp. 697, 698, 700 (D. Conn. 1970); In re Consumers Union of United States, Inc., 7 Media L. Rep. (BNA) 2038, 2039 (S.D.N.Y. 1981) (CONSUMER REPORTS is a "public service publication which advances a primary First Amendment objective by providing a public forum for impartial discussion of the safety, fitness for use and reliability of products offered to the consuming public"); Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980). Because consumer reporting helps citizens to make intelligent and well-informed marketplace decisions it commands full First Amendment protection. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 280 (3d Cir. 1980).

This action stems from the petitioner's dissatisfaction with a review of the Bose 901 loudspeaker system contained in an article entitled "Loudspeakers" appearing in the May 1970 issue of CONSUMER REPORTS.

The eight-page article evaluated the quality and performance of twenty-four brands of loudspeakers;[3] only seven paragraphs in a boxed-off section captioned "Some loudspeakers of special interest" discussed the Bose product. After describing the unique and unconventional design of the 901 system, the review described the opinions of a panel

3. The full article (PX7; A. 475-81) appears at pages 272-78 of the May 1970 issue of CONSUMER REPORTS (PX2). Ten copies of the May 1970 issue have been lodged with the Clerk for the convenience of the Court. (J.A. 338)

who were asked to compare the Bose 901 with a conventional speaker system and to judge for each "the direction from which the sound appeared to come (App. X48)," when a tape recording of the sound of a moving cricket-like noisemaker was played through each system. No differences were reported.

Next, the article compared music heard through the 901 and a conventional speaker and described the Bose in terms which were conceded (App. X158 n.19) to be highly complimentary:

> When it came to music, the panelists immediately noted a remarkable difference between the systems. The Bose 901 seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position.

This praise was tempered somewhat by judgments contained in the next paragraph where CU expressed its impressions of size and movement effects subjectively perceived through the 901 (App. X158 n.20):

> But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the Bose system. Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall.

These critical judgments were immediately limited and minimized by the next two sentences (id.):

> With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.

After reporting that the "same spacial openness and size distortions" occurred with monophonic records played through the Bose, the review next offered CU's assessment of the 901's sound quality (App. X49):

> As for sound quality, if the Bose 901 had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.

After discussing the Bose speaker's power requirements, the review concluded, not by recommending against purchase of the 901, but by inviting CONSUMER REPORTS readers to form their own opinions (id.):

> We think the Bose system is so unusual that a prospective buyer must listen to it and judge it for himself.

From the moment of publication Bose asserted there were numerous errors in the CU review. In February 1971, it commenced a civil action in the United States District Court for the District of Massachusetts charging CU with product disparagement, unfair competition and violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1976).[4]

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4. Issue was not joined until 1974 because Bose's original and amended complaints were each dismissed (with leave to replead) by the District Court.

At the liability trial,[5] the petitioner offered the testimony of only one witness: the founder, majority shareholder, chief executive officer and the namesake of the plaintiff corporation -- Amar G. Bose, Ph.D. Dr. Bose postulated at length on why Consumers Union's findings were either wrong or "scientifically impossible." (See, e.g., J.A. 27-58)

Although nearly ten years passed between the publication of the CONSUMER REPORTS article and the trial, Bose presented no evidence of any objective tests or measurements of the Bose 901 speaker system, and no evidence of any

5. The District Court severed the issues of liability and damages and held two non-jury trials.

listening tests in which the Bose or conventional loudspeakers were played before a group of observers (independent or otherwise) and their reactions recorded.

And Bose offered no proof whatever that CU published any statement with knowing or reckless falsity. Constitutional actual malice, the petitioner urged, could be inferred merely by accepting Bose's contention that when read literally the description of widened and wandering instruments was scientifically impossible and "could not have [been] heard." (LTr. 6-22) Moreover, Bose contended that CU's senior project engineer, Arnold L. Seligson, the person primarily responsible for conducting and supervising the research on the 901, deliberately downgraded the

petitioner's product in order to commercialize a potentially competing product supposedly embodied in a patent held by Seligson.

In contrast to the conclusory and unsupported trial testimony offered by the petitioner, Consumers Union introduced all of its relevant original research data; all of the documents involved in the editorial process, including original notes, drafts and revisions of the disputed review; the live testimony of Seligson and Alan Lefkow, the employees who conducted the research on the 901 and whose judgments are reflected in the published review; the live testimony of CU's technical director; and the expert testimony of Dr. David M. Green, the Chairman of Harvard's Department of Psychology and

Social Relations, a member of the National Academy of Sciences and a Fellow and the then president-elect of the Acoustical Society of America -- all of which demonstrated beyond cavil that CU labored long and hard with a consistent concern for truthful and responsible reporting in a successful effort to make the article accurately reflect the outcome of CU's research and the performance of the Bose system.

The evidence of CU's efforts and results, summarized in the following paragraphs, is uncontradicted. No contrary evidence was introduced to or credited by the District Court.

It was shown that Consumers Union had extensive experience in testing and reporting on loudspeakers and other consumer audio products. Prior to its

1969-70 tests of loudspeakers, Consumers Union had tested and reported on 100 or more different makes and models of loudspeakers over a ten year period. (J.A. 91-92) Since 1970, Consumers Union has tested at least 100 additional speaker systems. (Id.)

Consumers Union tested the Bose 901 in 1969 and 1970 as part of a much larger project involving twenty-four loudspeakers grouped into three categories. The research and editing process that led to publication was a lengthy one and involved many Consumers Union personnel and numerous internal checks and reviews. (J.A. 134-37, 145-47, 197-200)

Each speaker was subjected to an extensive battery of tests and measure-

ments which took several months to complete. These tests, which are described in detail by the District Court (App. X54-60), the Court of Appeals (App. X5-6) and in the CONSUMER REPORTS article (A. 475-76; PX7, pp. 272-73), were designed to measure both the objective electrical and acoustical output of the loudspeakers and the more subjective, psychoacoustical and aesthetic aspects of their performance. The tests were conducted and supervised by Seligson, then the Senior Project Engineer in charge of testing loudspeakers and other audio products, assisted by Lefkow, then a project engineer, two assistant project engineers and a statistician. (App. X50; J.A. 93-95)

Seligson and Lefkow were found to

be extremely capable, highly skilled and experienced in the testing and evaluation of loudspeakers. (App. X50-52, 30) Seligson has worked in the field of acoustics and testing of audio products since 1953. He received a bachelor's degree in electronic engineering from CCNY in 1952 and studied acoustics at Brooklyn Polytechnical Institute in 1953. From 1953 to 1956, while studying at night for a Master's degree, which he did not complete for personal reasons, Seligson worked for the United States Navy Laboratories testing acoustical equipment, such as microphones and loudspeakers. He joined Consumers Union in 1956 and has worked there ever since, except for a two-year period (1961-63) when he worked for a private corporation

on audio products. (J.A. 83-89; App. X51-52)

At Consumers Union, first as a Project Engineer, then as Senior Project Engineer and now as Chief of the Electronics Division, Seligson has worked on all aspects of the testing and evaluation of loudspeakers and other audio products. Prior to the 1969-70 tests, Seligson had participated in at least four or five Consumers Union loudspeaker projects involving the testing of at least 100 different brands and models of loudspeakers. (J.A. 91) As the District Court noted, Seligson has been testing and evaluating loudspeakers "for more than 25 years." (App. X52)

Because of the competence and expertise which Seligson demonstrated in

his work at CU -- testing and reporting on literally hundreds of audio products -- he was highly regarded and relied upon by his superiors. His work generated virtually no reader complaint mail and received an extraordinarily positive response from persons in the audio community, including the manufacturers whose products had been evaluated. (J.A. 201-03)

In addition to his work at Consumers Union, Seligson has written a scientific paper on microphone calibration, has been a monthly columnist for the Sunday New York Times on audio equipment, wrote an article for the February 1969 issue of Stereo Review on how Consumers Union tests loudspeakers (PX6) and has lectured publicly on the

testing and evaluation of audio products. (J.A. 89-90; LTr. 6-134-135) He also holds two patents, one granted in 1960 for a device similar to a condenser microphone, and the other granted in 1969 for an "Ionic Electro-Acoustic Transucer." (PX5) Neither patent has been used commercially.

Upon completion of the testing in January 1970, Seligson and Lefkow prepared the draft of the "Report to Editorial" -- a lengthy document which summarized the research and its results for Consumers Union's editorial department. The sections of the draft referring to the Bose 901 were drafted by Seligson and reviewed by Lefkow. (App. X65; J.A. 126-30) The draft was reviewed and revised by their superiors.

The revisions were widely circulated within Consumers Union. (J.A. 129-37, 145-47; App. X32-34)

Using the revised "Report to Editorial," a professional writer in Consumers Union's editorial department prepared a draft manuscript. (J.A. 134-35; App. X65-66) Prior to final approval for publication, the draft, subsequent revisions and galley proofs were circulated to and reviewed by Seligson, Lefkow, their superiors and others in several departments of Consumers Union for accuracy. (J.A. 129-37, 145-47, 200-03; App. X32-34)

At trial, both Seligson and Lefkow consistently testified that the published article accurately reflected the results of their research and the sub-

jective judgments they had reached as a result of testing the Bose product. They testified that at all times they had (and continue to have) a good faith belief in the truth of the entire review.

With respect to the comments on "instruments seem[ing] to grow to gigantic proportions and tend[ing] to wander about the room," Seligson described what he had heard during a listening test of the Bose in the following testimony which was credited and quoted by the trial judge (App. X95-97):

> As best as I could describe it, it would be that -- if you can imagine peering at an array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's atten-

tion upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed the fact that there is a broad light source behind.

This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you.

With the violin wide, the impression is one predominantly of sound coming at you from roughly the entire area in front of you.

In other words, roughly from in front of the entire area. But individual notes, however, may occasionally seem to focus a little better in one location than in another and give the impression that that is where the violin is for that moment.

And it is a shifting impression.

He concluded with this description of

his impressions (J.A. 180):

> It is something which is part of that vagueness which we mentioned in the story. We said simply it became apparent that the panelists could pinpoint the instruments much more precisely with a standard speaker system than with the Bose system. It is that difficulty in pinpointing the location that leads to some of the problems. It also makes it difficult to describe.

The other researcher whose observations formed part of the review, Alan Lefkow, described the subjective phenomena he had heard in these words also quoted by the District Court (App. X97):

> Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is

> played, the violin -- the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers.[6]

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6. The District Court conceded that others, independent of Consumers Union, observed similar effects. The Court quoted the trial testimony of Dr. David M. Green, one of the nation's leading psychoacousticians (App. X98):

> I have heard things [through the Bose 901] that I would describe as, first of all, as very broad image. There is no question about that. Secondly, the source is hard to localize. It's vague, and from moment to moment changes its location. So you might [say], especially on solo instruments, the apparent source moves from time to time. It could be located in any number of places in front of you. (See also J.A. 306-07)

Dr. Green also testified at length concerning the scientific principles involved which substantiate the validity of CU's judgments (J.A. 276-85) and described the results of an independent listening study he conducted with 16

(Footnote continued on next page)

When asked by the District Court to define the word "about" as used in the fragmentary phrase "tended to wander about the room," Seligson stated that

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(Footnote Continued from Previous Page)

persons unaffiliated with the parties who were unaware of the loudspeaker models being played and who compared movement of a flute heard through the 901 and a conventional speaker. (J.A. 285-311) The results of that experiment confirmed the truth of the CU assessment. Dr. Green thus concluded that solo passages played through the 901 "may be localized [by listeners] in different places in the listening room at different times" (J.A. 307), and that there was significantly more movement with the Bose 901 than with conventional speakers. (J.A. 299, 301, 303-04)

Although the District Court made passing reference to Dr. Green's testimony, the Court erroneously ruled that his personal observations of moving instruments and the results of his experiment with independent subjects were "irrelevant" because Seligson and Lefkow testified that the wandering sounds they heard were confined to an area within a few feet of the wall. (App. X162-63 n.33)

that word "was meant to mean about the rear wall between the speakers." He believed he had accurately conveyed this judgment to the reader by including in the text the example given in the next sentence: "For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall." (J.A. 123-24, 169-70)

Seligson and Lefkow each prepared a drawing at the trial in an attempt to depict on paper the size and movement phenomena they perceived. (PX 29, 35; J.A. 342-43) Both drawings indicated some movement towards and away from the wall, as well as laterally.

Seligson further testifed how difficult it was to describe precisely what he observed. (J.A. 180-82) He

called his trial drawings a "crude" or "broad" depiction of what he observed (J.A. 156), and because of the abstract and subjective nature of the experience, he had to resort to the array of shifting lights analogy quoted above. Dr. Green (J.A. 331-32) and Dr. Bose both agreed that it is quite difficult to translate an aural perception, an auditory image, into words. As Dr. Bose said, "there are no words to describe all the aesthetic aspects of sound." (J.A. 337)

The District Court rendered its decision on the liability issues in January of 1981, finding for Consumers Union on all claims save one. The unfair competition and Lanham Act counts were dismissed because after a "careful review of the testimony at trial," the

Court concluded that Bose failed to prove that CU was biased in its ratings of loudspeakers. (App. X145) Four of the review's statements alleged to constitute actionable product disparagement were held by the Court either not proven false or not shown to be defamatory.

The District Court held only one portion of one phrase of the article to be factually false[7] -- and that only by a preponderance of the evidence. The isolated fragment, "individual instruments heard through the Bose system ... tended to wander about the room," the Court found to be untrue because

7. In holding the fragment to be factual and not opinion, the District
(Footnote Continued on Next Page)

although the article reported accurately that "instruments...tended to wander," Consumer Union's engineers testified that

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Court wrongly wrenched the statement from its proper context as part of a judgmental, evaluative and figurative statement of aesthetic criticism. The statement was based on perceptions and judgments recognized by the District Court as being "subjective" and was replete with cautionary phrases of apparency that made its status as opinion crystal clear. The petitioner itself recognized that the phrase in issue was opinion and said so explicitly in a publication instructing its dealers on how to respond to the CONSUMER REPORTS article. (DX CU)

they heard the "wandering sounds" only "within a few feet of the wall near which the Bose 901 loudspeakers were placed." (App. X100) The difference between "tended to wander about the room" and "tended to wander about [or along] the wall" was what the Court found to be both false and disparaging.

The Court then determined that Bose met the tests enunciated by this Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and by the First Circuit in Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980), and was a "public figure, at least with respect to the limited issues of the characteristics

and quality of the Bose 901." (App. X132-33)[8] Accordingly, the constitutional rules of New York Times Co. v. Sullivan, 376 U.S 254 (1964), were held to apply.

Turning next to the issue of CU's asserted motivation to disparage the Bose product (an issue upon which plaintiff subjected Seligson to lengthy cross-examination and which constituted a "significant portion of the testimony at trial") (App. X133), the District Court rejected the petitioner's claims in their entirety (App. X136):

> Having reviewed the record and considered the demeanor of the witnesses involved, especially that of Seligson the Court finds that the possible

8. Bose conceded its public figure status on appeal and the Court of Appeals accepted the finding for purposes of the appeal. (App. X21)

> commercialization of his own patent did not influence Seligson's evaluation of loudspeakers for the Article. Specifically, the Court finds that Seligson did not downgrade the Bose 901 in order to smooth the way for his own invention. (emphasis supplied)

Bose's other claims that CU was motivated to disparage the 901 because of a bias against higher priced products, or to inject "sarcasm" and "spice" into its magazine, were rejected by the District Court because of "insufficient evidence" and because the testimony presented left the allegation "entirely within the realm of speculation." (App. X145)

Nonetheless, the District Court found that the disputed fragmentary phrase was published with "actual malice." (App. X142-43) As the fore-

going review of the undisputed trial testimony demonstrates, it did so without the benefit of any evidence, objective or subjective, upon which constitutional malice could be based. Instead, falsity plus the author's intelligence were erroneously held to create actual malice. In the Court's words (App. X142), Consumers Union's principal researcher was not to be believed solely because he

> is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its

plain, ordinary meaning.[9]

A separate trial on the issue of damages followed. Basing his decision only upon hearsay assertions of a general decline in growth of sales (sales continued to increase after the article's publication) and awarding compensation for critical but non-actionable portions of the article, Chief Judge Caffrey assessed damages in the amount of $115,296.00 plus interest and costs of $95,609.24, a total of $210,905.24. This finding was also

9. Although resting on an improper application of the standard of constitutional malice, the District Court facilely labeled its finding as one of credibility. As shown in greater detail at pp. 65-71, infra, this ipse dixit has no validity and was induced by an erroneous view of the law.

plain error of constitutional dimension.[10]

Consumers Union's appeal to the First Circuit raised numerous questions of error in both the liability and damages holdings. Because it could find no evidence of actual malice, the Court of Appeals did not consider CU's principal claims of truth and nonactionable opinion. Assuming arguendo a false

10. Because it reversed on issues of liability, the Court of Appeals did not review the damages findings. In fact, sales of the 901 increased dramatically after the CU article was published. 1970 sales increased incrementally over 1969 sales by some 48% and sales increased at an average annual rate of 35% until 1974. (A. 454, 567) Sales in late 1970 exceeded Bose's internal forecasts and were characterized by Bose itself as a remarkable performance. (A. 543-44) Starting with zero percent of the loudspeaker market in 1968, Bose grew to a position of first or second in dollar volume by 1971. (A. 94-96, 473-74, 540-41)

statement of fact (even though the Court noted, "we are not sure that the statement that instruments tended to wander about the room is false") (App. X19), the Court of Appeals reviewed the entire evidence "to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." (App. X23-24)

In carrying out its review, the appellate court held that this Court's decisions in New York Times Co. v. Sullivan, 376 U.S. 254, 285 & n.26 (1964), and Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), required it to examine the record independently to determine if the evidence could constitutionally support the lower court's conclusion of

actual malice.

Exercising independent judicial judgment without re-resolving any disputed factual findings or redetermining credibility,[11] the Court of Appeals faulted the District Court for its legal error in misapplying the constitutional standard of actual malice and held that "[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity." (App. X36) Having found that the District Court's findings rested on an erroneous view of the law, the Court of Appeals reversed.

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11. The Court of Appeals explicitly "recognize[d] that [it was] in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." (App. X23)

Given the proper application of the constitutional actual malice standard, and since only one rational result was possible on the undisputed facts that reversal was eminently correct.

Summary of the Argument

Since New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court has consistently held that independent appellate review of the record to determine whether actual malice had been proved with convincing clarity was an integral part of the protection the First Amendment affords publishers in defamation actions brought by public figures. Since the Seventh Amendment does not preclude independent appellate

review, a fortiori, neither can Fed. R. Civ. P. 52(a). To abandon the independent review requirement would eviscerate this constitutional protection as it would place in the factfinder's hands unreviewable final authority over fundamental First Amendment freedoms. In any event, the Court of Appeals here exercised only limited independent judicial judgment and did not redetermine disputed facts or review credibility findings.

The District Court's finding of actual malice was based on an erroneous view of the law and was thus properly reversed under any standard of appellate review. Pullman-Standard v. Swint, 456 U.S. 273, 287, 292 (1982). The trial court erred in imposing a negligence or

"reasonable person" standard rather than requiring petitioner to prove by clear and convincing evidence "subjective awareness of probable falsity." Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974). See St. Amant v. Thompson, 390 U.S. 727 (1968); Garrison v. Louisiana, 379 U.S. 64 (1964). Applying the wrong legal standard, the District Court found actual malice because it held that the author was too intelligent to have made an honest mistake. This finding, contrary to governing law, rewards ignorance and sloppy journalistic practices at the expense of the honest, intelligent publisher -- a result that turns New York Times on its head.

Under New York Times, the determi-

nation of actual malice is a mixed question of law and fact. In cases implicating fundamental constitutional rights, such determinations, sometimes called "ultimate facts," are subject to unhindered appellate review to ensure that the Constitution has not been abridged and that the evidence satisfies the high "clear and convincing" standard. Baumgartner v. United States, 322 U.S. 665 (1944).

The District Court's finding of actual malice was clearly erroneous. The evidence, virtually all of which was undisputed, shows beyond doubt that Consumers Union followed its normally careful editorial procedures, evidenced great concern for the truth and published a balanced and fair report of the

results of its own research on the Bose 901. Seligson, Consumers Union's chief test engineer and the principal author of the disputed passage, is an expert who is highly regarded in the field of audio testing. Despite petitioner's massive and sometimes vicious attack on Seligson's honesty and integrity, the District Court repeatedly upheld Seligson's credibility and freedom from conflict of interest or motive to disparage. The trial court's finding of actual malice is inconsistent with the trial court's findings on all other credibility and motive issues and violates the principle that disbelief alone does not supply affirmative proof, much less clear and convincing proof. The only rational conclusion from the

evidence is that, if Consumers Union chose the wrong word to use in its subjective, aesthetic criticism, it was a mistake honestly made.

Argument

POINT I

The Independent Appellate Review Carried Out by the Court of Appeals to Determine Whether the Constitutional Actual Malice Standard was Properly Applied is a Substantive Right Unaffected by a Rule of Civil Procedure

The petitioner's contention that Fed. R. Civ. P. 52(a) compelled the Court of Appeals to uphold the district judge's conclusion of actual malice ignores the long line of cases in this Court which make actual malice a constitutional standard, the determination of which must be reviewed independ-

ently against requirements drawn from the First Amendment.

In the landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court for the first time placed constitutional limitations upon public officials bringing libel suits.[12] Now, the First Amendment requires the public official or public figure[13] libel plaintiff to prove that the defamatory statement is false and to establish with convincing clarity that

12. Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 194 ("the [New York Times] opinion makes a notable shift in constitutional idiom...."). See also Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422 (1975).

13. The constitutional rules adopted in New York Times were extended to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). See Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Because the First Amendment freedoms involved are fundamental, the New York Times Court included, as an integral and inseparable part of the constitutional protection afforded to publishers, the right to have appellate courts independently examine the entire record to determine for themselves whether "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands." 376 U.S. at 285-86. These principles were stated as follows:

> Since respondent may seek a new trial, we deem that considerations of effective judicial

administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. [T]he rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see...whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Pennekamp v. Florida .... We must "make an independent examination of the whole record," Edwards v. South Carolina...so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law.

376 U.S. at 284-286 (emphasis supplied) (citations and footnote omitted).[14]

These constitutional guideposts have been followed in every public official and public figure defamation suit to reach this Court. For example, in Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), in reversing a decision by the Seventh Circuit which had overturned a district judge's grant of a directed verdict for the publisher, the Court referred to the "settled principle" that

> [i]n cases in which there is a claim of denial of rights under this Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis

14. Professor Kalven summarized the Times Court's holding as "mak[ing] actual malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself." Kalven, supra note 12, at 220.

> on which those conclusions are founded." [W]e have frequently had occasion to review "the evidence in the...record to determine whether it could constitutionally support a judgment" for the plaintiff. (citations omitted).

And, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), the plurality concluded that independent appellate review of constitutional facts is not merely permissive but is a constitutional mandate:

> Clearly, then, this Court has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so "this Court cannot avoid making an independent constitutional judgment on the facts of the case." The simple fact is that First Amendment questions of "constitutional fact" compel this Court's de novo review.

403 U.S. at 54 (citations omitted).[15]

Indeed, the teachings of New York Times and its progeny in this regard have received the virtually unanimous praise of First Amendment scholars and have been adopted by the American Law

15. As noted, the Court has been unswervingly faithful to these principles. See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970); St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 158 (1967); Rosenblatt v. Baer, 383 U.S 75, 86 (1966).

Institute.[16]

To urge, as petitioner does, that Rule 52(a) strips away the independent review required by the First Amendment would produce the anomalous result of apotheosizing a rule of civil procedure to a more weighty and dispositive category than the Seventh Amendment to the Constitution of the United States. In New York Times, the Court explicitly

16. See T. Emerson, The System of Freedom of Expression 535-37 (1970); Restatement (Second) of Torts § 580A comment g (1977); R. Sack, Libel, Slander, and Related Problems 538, 560 (1980); Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 467-468 (1975); Oakes, Proof of Actual Malice In Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev. 655, 707-09 (1979); Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 249-250 (1976).

rejected the argument that the Seventh Amendment ("no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law") forebade independent appellate review. In language that could not be more to the point it was stated:

> But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court ...where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Fiske v. Kansas, 274 U.S. 380, 385-386. See also Haynes v. Washington, 373 U.S. 503, 515-516.

376 U.S. at 285 n.26.

If even the Seventh Amendment is

deemed not to diminish the requirement of independent review of facts decisive of constitutionality, it follows inexorably as an a fortiori proposition that Rule 52(a) cannot do so.

Although this Court has never had the opportunity to rule on the issue presented here in a defamation case,[17] just last Term the Court held, in a case involving the First Amendment claim of a government employee tried before a district judge without a jury, that it has a constitutional "obligation ... [to] mak[e] an independent constitu-

17. But see Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), where the Court exercised the rule of independent appellate review where the question before it was the propriety of the grant of a directed verdict for the publisher by a federal district court judge.

tional judgment on the facts of the case." Connick v. Myers, ___ U.S. __, 51 U.S.L.W. 4436, 4439 n.10 (Apr. 20, 1983).

Numerous federal appeals courts have held that Rule 52(a) cannot limit independent judicial judgment where First Amendment rights, including the determination of actual malice in libel suits, are involved. In Buckley v. Littell, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), the Second Circuit specifically held the clearly erroneous standard to be overridden by the "duty to 're-examine the evidentiary basis' of the lower Court decision," even when the fact-finder is a federal judge. And in Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1363 (5th Cir.), cert.

dismissed, 447 U.S. 931 (1980), when the constitutional fact before it was obscenity, the Fifth Circuit held that this Court's decision in Miller v. California, 413 U.S. 15, 25 (1973), required it to exercise independent review, although the fact-finder was a judge. The Sixth Circuit held in Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948 (1971), that "when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider them not 'clearly erroneous' as that term is employed in Rule 52(a) F.R. Civ.P. We must make our own examination of the material from which decision is made." See also Davis Co. v. United

Furn. Workers, 674 F.2d 557, 563 (6th Cir.), cert. denied, 103 S. Ct. 296 (1982); Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981); Glasson v. Louisville, 518 F.2d 899, 903 (6th Cir.), cert. denied, 423 U.S. 930 (1975).[18]

18. The following decisions, representing appeals from cases tried before juries as well as those in which the district judge ruled upon a motion for summary judgment, all stand for the proposition that independent appellate scrutiny of an actual malice conclusion is mandated: Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) (jury), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 510 n.70 (3rd Cir.) (judge), cert. denied, 439 U.S. 861 (1978); Baldine v. Sharon Herald Co., 391 F.2d 703, 706 (3d Cir. 1968) (jury); Ryan v. Brooks, 634 F.2d 726, 728 (4th Cir. 1980) (jury); Long v. Arcell, 618 F.2d 1145, 1147 (5th Cir. 1980) (jury), cert. denied, 449 U.S. 1083 (1981); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1258 (5th Cir. 1980) (jury), cert. denied, 452 U.S. 962 (1981);

No valid reason has been or can be put forth as to why this Court should abnegate the role of independent appellate scrutiny of the proper application of the constitutional malice standard when the fact-finder is a single and fallible federal judge rather than a state court judge or a federal or state jury. Assuredly, the compulsion to defer to a state court or to any jury is greater than that to be accorded to an individual federal judge. Deference to juries enjoys constitutional dignity and is phrased absolutely while any defer-

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Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026-27 (5th Cir. 1975) (jury); Fadell v. Minneapolis Star and Tribune Co., 557 F.2d 107, 108 (7th Cir.) (judge), cert. denied, 434 U.S. 966 (1977). See also Berry v. National Broadcasting Co., 480 F.2d 428, 432 (8th Cir. 1973) (jury), cert. dismissed, 418 U.S. 911 (1974) (jury) (false light, invasion of privacy).

ence to be accorded to a federal judge is based upon a mere procedural rule.

To elevate Rule 52(a) to a status compelling an appellate court to be bound by a district judge's application of the actual malice standard (especially in the circumstances of this case where the finding of actual malice is not only totally lacking in support in the record but is in conflict therewith and was plainly induced by an error of law) would be to give that procedural rule an effect that works a fundamental unfairness at war with the First Amendment, cf. Lisenba v. California, 314 U.S. 219, 237-38 (1941), and would engender public dismay at an arbitrary judicial administration.

Unless proper corrective authority

can be exercised by the Courts of Appeals, the constitutional standards for determining actual malice will differ from individual judge to individual judge. The First Amendment protections will lose their unity and certainty and freedom of expression will be dampened.

Moreover, unfair and unjust holdings which become impervious to reversal could lead to public contempt for the judicial system. As stated by Professor Blume, a member of the Advisory Committee on Rules for Civil Procedure which drafted Rule 52(a) and one of the leading proponents of the Rule as drafted, "[a] sure way to arouse distrust and suspicion in the public mind is to give the district judge final power over life, liberty or property." Blume,

Review of Facts in Non-Jury Cases, 20 Am. Jud. Soc'y 68, 71 (1936).

To preserve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," to give "the freedoms of expression...the 'breathing space' that they 'need...to survive,'" and to assure that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered,'" New York Times, 376 U.S. at 270-72, it is essential that blinders not be placed over the eyes of our appellate courts and that the constitutionally-based rule of independent judicial judgment not here be eviscerated.[19]

19. Justice Goldberg's statement in
(Footnote Continued on Next Page)

Further, a full reading of the Court of Appeals' opinion makes it plain that that court exercised its independent review in a limited fashion, only "to ensure that the district court had applied properly the governing constitutional law and that the plaintiff had indeed satisfied its burden of proof." (App. X22-23) The appellate court did not re-review or redetermine any disputed underlying facts. There were none. Nor did it purport to go

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Haynes v. Washington, 373 U.S. 503, 515-16 (1963), is particularly apposite: "[W]e cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.'" (emphasis supplied). See also Wood v. Georgia, 370 U.S. 375, 386 (1962).

beyond any legally valid credibility finding by the district judge. It did not reweigh or reevaluate conflicting testimony concerning the subsidiary events which led to the District Court's conclusion of actual malice. The Court of Appeals' review accepted the District Court's findings and independently reviewed only the definition and proper application of the constitutional standard by which those incontrovertible facts were to be tested. The meaning of undisputed facts in relation to the First Amendment standard of actual malice is precisely the constitutional issue which this Court has directed that federal appellate courts reserve for themselves.

As Justice Frankfurter stated in Watts v. Indiana, 338 U.S. 49, 51 (1949):

> [An] "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication.

Unquestionably, the proper domain of any appellate court exercising independent review of facts having fundamental constitutional significance includes well within its ambit (without even approaching the outer limits of the proper scope of independent review) the right to determine for itself without any artificial constraint whether the conclusion of constitutional malice is

adequately supported in the record and whether the constitutional rules have been properly applied.

The standard of review, as employed by the Court of Appeals, was therefore eminently correct.

POINT II

As the District Court's Determination of Actual Malice was Based on an Error of Law, It is Not Subject to Rule 52(a) and was Properly Reversed by the Court of Appeals

Under any set of circumstances, Rule 52(a) does not apply in this case because "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). See also Inwood Laboratories, Inc. v. Ives Laboratories,

Inc., 456 U.S. 844, 856 n.15 (1982).

Recognizing that the district judge had committed plain legal error ("[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity") (App. X36) the Court of Appeals properly reversed.

From New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), to the present this Court has never wavered in rigorously defining and demanding proper application of the constitutionally-required actual malice standard. See, e.g., Herbert v. Lando, 441 U.S. 153, 156 (1979). The plaintiff through clear and convincing proof must adduce sufficient evidence to establish that the publisher acted with "subjective aware-

ness of probable falsity," Gertz v. Robert Welch, Inc., 418 U.S. at 332 n.6, that he in fact knew what he published was false or "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

This Court has resisted all efforts by public official and public figure plaintiffs to diminish the definition or to allow actual malice to mean something less than what the First Amendment requires. Falsity, defamatory content, unreasonable belief in the truth, negligence, strict liability, misinterpretation or misconception of the facts -- all of these have been rejected as sufficient bases by themselves, or in combination, to establish actual malice. Gertz v. Robert Welch, Inc., supra;

Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); St. Amant v. Thompson, supra; Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6 (1970); Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, supra.

The "honest utterance, even if inaccurate," must be protected because it "further[s] the fruitful exercise of the right of free speech." Garrison v. Louisiana, 379 U.S. at 75.

The District Court, however, ignored these clear holdings. By substituting its own predilection of how a reasonable person would have acted, the

trial court misapplied the applicable law and committed legal error of constitutional magnitude.

The District Court did not find that "the publication was [not] made in good faith." St. Amant v. Thompson, 390 U.S. at 732. Indeed, quite the opposite is the case. The District Court never doubted Consumers Union's good faith (App. X140) and it rejected out of hand all of petitioner's attacks upon the honesty or integrity of Consumers Union and its staff. (App. X133-38, 143-45)

Rather, the District Court, eleven years after publication, held solely that it was unreasonable for an intelligent man to have confused "about the room" with "about (or along) the wall."

Such a finding, the Court of Appeals rightly held, is erroneous as a matter of law.

Ever since New York Times Co. v. Sullivan it has been clear that actual malice cannot be inferred from falsity alone.[20] A "test of truth," this Court has repeatedly said, does not provide the "breathing space" that the "freedoms of expression...'need to survive.'" New York Times at 271-72.

A finding of actual malice that is based upon a notion of the unreasonableness of a publisher's belief in

20. "[N]either factual error nor defamatory content suffices to remove the constitutional shield...." New York Times Co. v. Sullivan, 376 U.S. at 273. And see Justice Goldberg's concurring opinion, 376 U.S. at 298 n.2: "The requirement of proving actual malice or

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the truth suffers from such a defect: "[t]he reasonable-belief standard...is not the same as the reckless-disregard-of-truth standard." Garrison v. Louisiana, 379 U.S. at 79. As the Court held in St. Amant v. Thompson:

> But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.

390 U.S. at 731-32.

The District Court strayed far from these teachings. In determining actual

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(Footnote Continued from Previous Page) disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard."

malice by combining a highly irrational, unique and extra-contextual interpretation of the character and content of the publication with an objective, reasonable person standard, it afforded Consumers Union none of the "breathing space" for erroneous statement this Court has been so careful to preserve. The trial court effectively held Consumers Union to strict liability: because CU is a highly professional publisher with an intelligent staff, CU is not capable of committing honest error.

That the District Court misapplied the constitutional standards despite its denials (App. X140) is plain from a reading of its opinion. After acknow-

ledging Consumers Union's consistent professions of good faith belief in the accuracy of the article as written (id.), and in the absence of any contradictory evidence, the District Court concluded (App. X141-42) that actual malice existed only because

> according to Seligson, the words used in the Article -- "About the room"--mean something different to him than they do to tne populace in general. If Seligson is to be believed, at the time of publication of the Article he interpreted, and he still interprets today, the words "about the room" to mean "along the wall." After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as "about" to mean anything other than its

plain, ordinary meaning.[21]

Expressed simply, the District Court's conclusion was based only on the following equation: falsity + the author's intelligence = actual malice.

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21. The District Court relies on its own view, not supportedly by any evidence in the record or by any citation, of the strict, literal meaning of the words used by Consumers Union. Regardless of whether the Court's definitions are correct, such "[a] fussy insistence upon literal accuracy 'would condemn the press to an arid, dessicated [sic] recital of bare facts.'" Loeb v. Globe Newspaper Co., 489 F. Supp. 481, 486 (D. Mass. 1980). Particularly where, as here, the subjective perception being described is inherently ambiguous and admittedly difficult to describe precisely (see pp. 20-26, supra), the reader will not interpret the comment literally (as the District Court agreed, App. X92-93), but in a "loose, figurative sense." National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). The description is thus analogous to protected "rhetorical hyperbole," Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970), (Footnote Continued on Next Page)

This Court, however, has already rejected a nearly identical finding of actual malice similarly improperly based on a reasonable person standard. In Garrison v. Louisiana, supra, the trial judge had made a determination virtually identical to that of the District Court here:

> It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of

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(Footnote Continued from Previous Page) or "[m]ere exaggeration, slight irony or wit, or all of those delightful touches of style which go to make an article readable [but] do not push beyond the limitations of fair comment." Briarcliff Lodge Hotels, Inc. v. Citizens-Sentinental Publishers, Inc., 260 N.Y. 106, 118-19, 183 N.E. 193 (1932).

> what he charged them with in the defamatory statement....It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore, I do not believe that the qualified privilege...is applicable...."

379 U.S. at 78-79.

This Court rejected that analysis: "This is not a holding applying the New York Times test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard." Id. at 79.

As the Court stated in Garrison, and reaffirmed repeatedly thereafter:

> The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on disregard

for the truth.[22]

Even if by second guessing it could be said that Seligson should have known that his description was inaccurate, even if he and his superiors should have been more careful and more precise in their use of language, that they were not is not a constitutionally acceptable ground for finding actual malice. The case is even clearer here where the publisher was engaged in a subjective critique and

22. See, e.g., Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. at 10 (It was error of constitutional magnitude "to find liability merely on the basis of a combination of falsehood and general hostility"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 152 (1967) ("[W]e have rejected...the argument that a finding of falsity alone should strip protections from the publisher.").

aesthetic evaluation (App. X60); where the language employed was suffused with metaphorical and figurative usage; and where, as the District Court found, the terminology used by those in the field is replete with "confusion." (App. X87, 162 n.29)

To find actual malice here would be as impermissible as the Court held it to be in Time, Inc. v. Pape, 401 U.S. 279, 291 (1971): "[First Amendment] protection would not exist for errors of interpretation...for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." Even if Seligson were wrong, that is, even if he chose the wrong language to describe the subjective, abstract, aural

phenomenon he heard in the mistaken belief that it was the correct phrase, he cannot be said to be guilty of actual malice because he believed it to be truth. Tilton v. Cowles Publications Co., 76 Wash. 2d 707, 459 P.2d 8, 15, 18 (1969), cert. denied, 399 U.S. 927 (1970). See also Loeb v. New Times Communications Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1350 (S.D.N.Y. 1977); R. Sack, Libel, Slander, and Related Problems 213 (1980) ("A person who believes and intends to say one thing is not lying and not guilty of actual malice merely because he chooses the wrong language to say it.")

In the absence of any evidence at all that "impeaches the witness' good

faith" belief that his description was "substantially correct," New York Times Co. v. Sullivan, 376 U.S. at 286, (the District Court did not and could not point to any such evidence because none existed), the conclusion of actual malice was plainly based on an erroneous interpretation of the law and was properly reversed by the Court of Appeals.

POINT III

The Court Of Appeals Properly Exercised Independent Review Because the Determination of Actual Malice is an Ultimate Fact Involving Both Law and Fact Issues

Even if actual malice were not required to be reviewed independently under New York Times and its progeny and even if the district judge had not reached his conclusion because of an

erroneous view of the law, Rule 52(a) would still not control under traditional standards of appellate review.

Actual malice is not simply a factual determination. It is an "ultimate fact" -- an issue in which law and fact are so intertwined and the standard of proof required so high that appellate courts have not been held bound by what the trial court may label "findings of fact."

Since it is not possible to separate the legal component of a finding of actual malice from the factual one, and because the determination implicates fundamental constitutional rights, appellate courts, this Court held in New York Times Co. v. Sullivan, 376 U.S. 254, 285 n.26 (1964), are required to exercise

independent review to ensure that the governing law is properly applied to the facts.

In this regard New York Times echoes an earlier holding by this Court to the same effect. In Baumgartner v. United States, 322 U.S. 665 (1944), the issue was whether the Government could revoke petitioner's citizenship. It had previously been decided, in Schneiderman v. United States, 320 U.S. 118, 125 (1943), that the Government had to prove by "clear, unequivocal and convincing" evidence that the petitioner had fraudulently misrepresented his true allegiance when becoming an American citizen. Despite concurrent findings of fact by two lower courts, this Court in Baumgartner conducted its own independent

review of the record and reversed the lower courts' holding that Baumgartner had committed fraud.

In so doing, Justice Frankfurter recognized that certain types of factual findings -- "ultimate facts" involving questions of both law and fact -- are freely reviewable by appellate courts even if credibility findings are involved:

> The phrase "finding of fact" may be a summmary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print.... Finding so-called ultimate "facts" more clearly implies the application of standards of law.... Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the

> conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court.

322 U.S. at 670-71.

In words that apply with equal force to the finding of actual malice here, Justice Frankfurter stated that since the "decision here for review cannot escape broadly social judgments" touching upon important fundamental rights, the "recognized scope of appellate review is usually differentiated from review of ordinary questions of fact." Id. at 671.

Unimpeded appellate review, the Court stressed, is particularly important when the standard of proof is higher than usual -- when it is "clear and convincing" rather than a mere "preponderance." Otherwise, the policy considerations underlying such a high

standard will be left to the whim and fancy of the finder of fact:

> Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof...would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Id. at 671 (citation omitted).

This Court has recently restated and reaffirmed the importance to society and to litigants of the setting of a high standard of proof:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979); see also Sumner v. Mata, 449 U.S. 539, 551 (1981).

The higher standard has been required in public figure defamation cases in recognition of the fundamental First Amendment liberties involved: "the interests at stake...are deemed to be more substantial than mere loss of money." Addington v. Texas, 441 U.S. at 424.

If the protections afforded by the First Amendment are to be preserved and the standard of clear and convincing proof of actual malice is to have meaning and continued vitality, appellate courts, as the Court of Appeals recognized, must exercise independent review of the trial court's ultimate finding of actual malice.

To hold otherwise would have the practical effect of making the trial judge the sole and final arbiter of both the legal and the factual questions involved and would leave the standard of proof to "the unguided discretion of a [trial judge]." Time, Inc. v. Pape, 401 U.S. at 291.

Even in cases not involving this higher standard of proof, this Court has recognized that some factual issues are so intertwined with principles of law as to require plenary appellate review. This Court has often stated that the determination of a "mixed question of law and fact" can be freely reviewed by an appellate court:

> The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such

> review, the court may substitute its judgment for that of the [fact-finder].

Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1937). Accord, Bogardus v. Commissioner, 302 U.S. 34, 39 (1937); Helvering v. Rankin, 295 U.S. 123, 131 (1935). Cf. United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948). But see Commissioner v. Duberstein, 363 U.S. 278, 289 n.11 (1960).

Pullman-Standard v. Swint, 456 U.S. 273 (1982), is in accord. In that case, the Court recognized that there is a "mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent." 456 U.S. at

289 (footnote omitted).[23]

Actual malice is such a "legal concept." It is a constitutionally-based construct which denotes a complex or matrix of legal and factual determinations -- the social judgment --that must be made with great confidence and certainty in the outcome before the protections of the First Amendment may be taken away from a publisher. It is completely infused with legal policy and constitutional considerations and is thus wholly unlike the traditional, purely factual findings of design, motive or

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23. Cf. United States v. Appalachian Power Co., 311 U.S. 377, 404 (1940):
> When we deal with issues such as these before us, facts and their constitutional significance are too closely

(Footnote Continued on Next Page)

intent that stand apart from legal standards and that cannot ordinarily be reversed unless clearly erroneous.

The Court need not rule in this case that all mixed questions of law and fact are independently reviewable. Baumgartner v. United States, 322 U.S. 665 (1944), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), hold, at the very least, that when such a mixed question involves fundamental rights and must be proved with convincing clarity, appellate review cannot be narrowly circumscribed by a trial court's use of the label "finding of fact". In such

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> connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests.... Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.

circumstances, the appellate court may -- indeed, must -- conduct an independent review to ensure that the governing legal principles have been properly applied and that the ultimate finding is consistent with the constitutional principles at stake.

The Court of Appeals properly conducted such a review. Its conclusion should be affirmed.

POINT IV

The District Court's Finding of Actual Malice is Clearly Erroneous.

Petitioner urges that because the district judge purported to base his conclusion of actual malice in part on demeanor, it is a credibility finding which binds an appellate court unless "clearly erroneous." (Pet. Br. at 49)

As previously shown, however, the trial court's actual malice determination was not a valid credibility finding which the Court of Appeals could not look behind but, rather was a conclusion based on an erroneous view of the law, or was a finding of a constitutional or an ultimate fact, each of which calls for independent appellate review.

Nonetheless, even if it is held that the finding of actual malice can be reversed only if it is "clearly erroneous" under Fed. R. Civ. P. 52(a), it must still fall.

Rule 52(a) "was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice." United States

v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948) (footnote omitted). Its purpose is to permit appellate courts to "reverse findings of fact by a trial court where 'clearly erroneous,'" id. at 395, free of the constitutional limitations imposed by the Seventh Amendment on appellate review of fact-finding by juries.[24]

The rule does not make the trial court's findings, even when involving "the candor and credibility of the witnesses," binding or conclusive on appeal. United States v. United States Gypsum Co., 333 U.S. at 395.[25] The test,

24. For a recent history of the adoption of Rule 52(a), see Note, Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?, 52 St. John's L. Rev. 68, 69-75 (1977).

25. Indeed, in Gypsum the Court reversed a finding based on credibility as being clearly erroneous. 333 U.S. at 396.

set forth in Gypsum and often repeated since, is:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Id. [26]

There is no evidence below to support the trial court's finding of actual malice. When scrutinized under any standard of appellate review, the record admits of but one rational conclusion: the definite and firm conviction that a mistake was made.

Summarized here, (the evidence is described in greater detail in the

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26. Whether the appellate court can exercise independent review or is bound by the clearly erroneous test, the appellate court must still review all the evidence in the record.

Statement of the Case, pp.12-19, 30-31, supra), the evidence, virtually all undisputed and uncontradicted, demonstrates beyond cavil that not a scintilla of evidence existed upon which a rational finding of actual malice could be based:

a) Consumers Union and its magazine have a "very favorable reputation for independence, integrity, accuracy and freedom from bias" (App. X4, 45);

b) the disputed article was the end result of a lengthy process of original research (App. X5-6, 54-60; A. 475-76; PX7, pp. 272-73) and careful editorial preparation (J.A. 129-37, 145-47, 200-03; App. X32-34);

c) Seligson, the engineer in charge of the research and the person primarily responsible for the preliminary drafts of

the article, had many years of experience in the testing of loudspeakers and audio products. His work at Consumers Union had earned him the praise of his superiors, CU's readers and the audio industry (J.A. 201-03);

d) the draft Report to Editorial was edited and revised by Seligson's superiors and all drafts of the article plus all galleys and page proofs were circulated to numerous persons at Consumers Union in various departments for revision and editing (J.A. 129-37, 145-47; App. X32-34), all in accordance with Consumers Union's normal editorial procedures (J.A. 198-200);

e) Consumers Union produced at trial all of its research data and editorial material. Bose produced

nothing;

f) the published article fairly reflected the results of Consumers Union's own research, both favorable and unfavorable to the Bose product;[27]

g) the trial court made three findings in support of Seligson's cred-

27. Nothing in the research data or in the published article was so inherently improbable that only a reckless person would have put it in circulation and the District Court made no such finding. Indeed, that Court fully credited Seligson's and Lefkow's testimony on the localization effects they heard (App. X94-97) and flatly rejected Bose's contention of scientific impossibility. (App. X98-99) Seligson's testimony that in preparing the article he neither perceived nor intended any defamatory or disparaging innuendo (J.A. 163-69) was uncontradicted. The Court's holding that the single phrase "about the room" carried with it an innuendo of "bizarre"

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ibility and lack of subjective motive to disparage. They are all unchallenged on appeal and are all inconsistent with the finding of actual malice:

-- after considering the demeanor of the witnesses, "especially that of Seligson" (App. X136), the trial court rejected petitioner's efforts, which took up much time at trial, to establish Seligson's (and CU's) dishonesty and bias because of a patent held by him (id.);

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or "grotesque" effects was without any foundation in the record. Significantly, the article makes no such statement. In fact, read fairly in context, as it should be, the article flatly contradicts any such innuendo or implication. The article states that the localization problems "seemed inconsequential" with orchestral music and that when listening to soloists only that "we think they might become annoying" (emphasis added). To find liability here based on the content of the article -- as in effect the District Court did in part -- constitutes "Malice in Wonderland."

-- the District Court similarly rejected Bose's argument that Seligson and his assistant Lefkow "completely fabricated" the so-called cricket test (App. X152-53 n.12);

-- the trial judge found that when Seligson thought the Bose's performance on a particular test was too low because of the Bose's unconventional design, Seligson exercised his subjective judgment to upgrade the rating of the Bose 901. (App. X59)

Standing in contrast to this evidence and these findings -- all of which unequivocally show that Consumers Union exhibited a constant concern to publish a truthful and accurate article and that Seligson spoke the truth at trial --

was nothing else.[28]

28. Petitioner contends for the first time in this Court that other evidence exists to buttress the trial court's finding of actual malice. (Pet. Br. at 36-37, 55-60) The trial court, however, did not rely on any such evidence in making its finding and petitioner made no such arguments in the Court of Appeals. (Pet. Br. in Ct. of App., pp. 32-38) The District Court limited itself solely to the purported fact of falsity and Seligson's intelligence.

Moreover, petitioner's "other" evidence is not supported by the record. Petitioner asserts that all Consumers Union heard was movement associated with "normal stereo sound" or produced by special recordings, and faults CU for failing to compare the Bose 901 with a conventional loudspeaker during the special listening test, for failing to conduct a test using twelve "young music students" and for refusing to conduct a demonstration of the loudspeaker or to identify what records had been played during the test at a post-publication meeting between CU and petitioner on June 3, 1970. (Pet. Br. at 52-60)

The special listening test, however, was a comparative test. As described in

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There was no evidence in the record found or relied upon by the District Court which showed that Consumers Union

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the Report to Editorial quoted by the District Court (App. X151 n.11, 154-56) and by Seligson at trial (J.A. 102), the Bose 901 and, for a brief time, another unconventional loudspeaker, the Harman Kardon HK-50, were compared to a conventional loudspeaker during "several hours [of listening] to a variety of records." (App. X60) Seligson and Lekfow played not special recordings, but a "large" number of records which were selected at "random" from the "closet full of recordings which [CU had] accumulated over the years" of classical and popular music. (J.A. 151, 227, 236-37)

Although urged to do so by petitioner, the District Court did not find that CU heard only "normal stereo sound" or that the wandering was induced by special recordings. As noted, the District Court credited fully Seligson's and Lefkow's uncontroverted descriptions of what they had heard. (App. X94-97) There was also no evidence to contradict Seligson's, Lefkow's and Dr. Green's testimony that what they had heard on the Bose they did not hear with conventional loudspeakers. (J.A. 103-04, 162-63, 167-68, 182-86, 305-10, 327-28) Dr. Bose

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published a knowing falsity or recklessly disregarded the truth.

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himself testified that movement-inducing special recordings were "not a factor" in 1970. (J.A. 56-57)

Finally, Consumers Union's purported post-publication refusal to provide information or demonstrate the 901 to Dr. Bose does not constitute evidence of actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). In fact, in response to Bose's complaints, Consumers Union retested the Bose 901 three separate times -- once in June 1970 (J.A. 203-06), and then in 1979 (J.A. 177-78; LTr. 10-10-18; PX31; LTr 13-26-27, 13-145-146) and again in 1980. The 1980 retest was a scientific experiment designed and conducted by Dr. Green and involved playing the Bose 901 and a conventional loudspeaker to sixteen subjects who were not affiliated with Bose or with Consumers Union. (J.A. 286-302, 304, 311-15) The data from all three tests were introduced at trial and confirmed the accuracy of Consumers Union's article in all respects.

Despite the passage of ten years time between the publication date and trial, despite its claims in this Court and despite the fact that it had the burden of proof, Bose introduced no test data relating to the performance of the Bose 901 system or conventional loudspeakers.

All that the District Court relied on was that Court's conclusion that since the "plain, ordinary meaning" of "about" was crystal clear,[29] and that since Seligson was an "intelligent person," it is simply impossible for the Court to believe that he knew the article to be truthful. (App. X142) Such a finding of lack of credibility is a facile ipse dixit which cannot withstand even limited appellate scrutiny.

Disbelief of a publisher's statement of good faith cannnot constitute clear

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29. But, cf. "'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'" Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 867 n.17 (5th Cir. 1970) (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

and convincing proof[30] of actual malice where it stands alone, and is (a) in contradiction to the District Court's own findings that in all other vital respects the author's testimony was entirely credible, that the author and the publisher had no motive to disparage petitioner's product, that the author had in another part of the article upgraded the evaluation of the Bose 901 and that

30. This standard of proof has been characterized as being "'intermediate between the normal 'preponderance of the evidence' civil standard and the 'beyond the reasonable doubt' criminal standard,'" Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980); Addington v. Texas, 441 U.S. 418, 424 (1979); and as proof which must be "strong, positive and free from doubt ...full, clear and decisive...." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 175 (1975) (citations omitted).

the author was an expert at what he did; and is (b) in conflict with uncontroverted evidence that the author was highly respected in his field, that what was being described was an abstract, subjective perception of an ambiguous aural phenomenon, published in the context of an aesthetic review, that the publisher followed its normally careful editorial processes designed to insure accuracy and freedom from bias, that the article was balanced in that it presented both praise and criticism and that it contained language explicitly limiting the negative impact of the comment in question.

Even in the ordinary civil action where plaintiff need prove his case only by a preponderance of the evidence, it has long been the rule that disbelief

alone does "not supply a want of proof," Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 576 (1951), sufficient even to create a jury question.

This Court and others have often cautioned against the impropriety of using disbelief alone to support a finding that the opposite is the fact. Nishikawa v. Dulles, 356 U.S. 129, 137 (1958); NLRB v. Gotham Industries, Inc., 406 F.2d 1306, 1310 (1st Cir. 1969); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), cert. denied, 382 U.S. 879 (1965); Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.).

If disbelief alone cannot provide sufficient proof in the ordinary civil case, it is even more inadequate in this case when the plaintiff's constitution-

ally mandated burden of proof is much higher and the societal interest "in the correctness of [the] factual conclusions" is more substantial. Addington v. Texas, 441 U.S. 418, 423 (1979).

Internally inconsistent, inherently incredible, and without any affirmative proof to support it, the trial court's finding of actual malice is clearly erroneous.

Moreover, the trial court's finding makes no rational sense. Seligson and Lefkow, when asked at trial to translate their aural perceptions into pictoral form, produced drawings which punctiliously depicted what they heard: "wandering sounds [in the words of the

District Court] within a few feet of a wall near which the Bose 901 loudspeakers were placed." (App. X100, footnote omitted)

Had these men had any doubts that the article described something else, had these men been prevaricators engaged in a plan to besmirch petitioner's product, would they not have attempted to cover up their lie and instead drawn charts showing the sound to have moved all over the listening room?

Only their own integrity and honesty -- as the District Court found in rejecting all other challenges to their credibility -- and their good faith belief in what they wrote prevented them from doing so. The trial court's finding to the contrary is simply not in accord with

one's "experience with the mainsprings of human conduct." Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

As the Court of Appeals realized, the evidence admits of only one conclusion: defendant may have chosen the wrong phrase in its aesthetic critique, but it did so in the honest belief that it was uttering the truth.[31]

Conclusion

Under any standard of appellate review, the trial court's finding of actual malice was constitutionally and

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31. Since the "record permits only one resolution of the factual issue[s]," there is no need to remand this case back to the Court of Appeals for further consideration. Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982).

factually inadequate. It was properly reversed by the Court of Appeals and that reversal should be affirmed by this Court.*

Dated: New York, New York
July 13, 1983

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* Attorneys for Respondent gratefully acknowledge the research assistance in the preparation of this brief provided by Marya Yee, a graduate of Brooklyn Law School, and Robert Shuman, a student at Brooklyn Law School.

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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

Table of Contents

		Page
I.	The "de novo review" made by the Court of Appeals did not comply with the standard of review required by the First and Fifth amendments.	2
II.	In finding "actual malice", the district court did not apply a "reasonable man" test, did not equate falsity plus intelligence with actual malice, and did not rely simply on disbelief of Seligson, but found "actual malice" because it found that Seligson knew that what he wrote was false, and because it did not believe his testimony that what he wrote described what he had observed.	22
III.	The difference between the false statement attributing bizarre grotesque qualities to the Bose system and the truth of observing normal stereo sound was not trivial.	31
IV.	The findings by the district court that Florman's testimony was wholly untrustworthy and not credible and that Seligson's testimony was not credible were not clearly erroneous.. . .	33

Page

V. The district court found that respondent not only deceived consumers it pledges to serve by making a false and disparaging statement about petitioner's Bose 901 loudspeaker, but also in falsely representing it rated the loudspeakers by objective standards and misleadingly using "panelists." 39

VI. Petitioner introduced evidence of the twelve years of research behind the Bose 901 loudspeaker and respondent's "research data." . . 41

VII. The "standards of verbal accuracy" required of publishers are by no means impossible to articulate or to meet. . . 43

Table of Authorities

Cases

Cantrell v. Forest City Pub. Co., 419 U.S. 245 12

Cher v. Forum International, 694 F.2d 634 9

Edwards v. South Carolina, 372 U.S. 229 2,7

	Page
Garrison v. Louisiana, 379 U.S. 64	24
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844	4,6, 18
New York Times Co. v. Sullivan, 376 U.S. 254	2,7, 8,12, 14,44
Pullman-Standard Co. v. Swint, 456 U.S. 273	4
Rogers v. Lodge, U.S. 73 L. ed. 2d 1012	4
St. Amant v. Thompson, 390 U.S. 727	4
Time, Inc. v. Hill, 389 U.S. 374	8,9
Miscellaneous	
Annot., 61 L. ed. 2d 975	12
U.S. Const., Amend. I	9,43
U.S. Const., Amend. V	2,3, 16
Fed. R. Civ. P. 52(a)	2,3,5, 7,9, 10,16, 17,18, 19,45

Page

Griswold, *Helping the Supreme Court by reducing the flow of cases into the courts of appeals*, 67 JUDICATURE 58 17

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REPLY BRIEF FOR PETITIONER

Since respondent and its supporters ignore and/or mischaracterize relevant record portions and cases, a response is warranted.[1]

[1] We refer to the briefs of petitioner, respondent, Civil Liberties Unions and N. Y. Times et al. by Pet. Br., Resp. Br., CLU Br. and Media Br., respectively. Reference to record portions is the same as in our principal brief. Pet. Br. 1-2 n.1.

I. THE "DE NOVO REVIEW" MADE BY THE COURT OF APPEALS DID NOT COMPLY WITH THE STANDARD OF REVIEW REQUIRED BY THE FIRST AND FIFTH AMENDMENTS.

Respondent argues that in First Amendment cases an "independent appellate review" is mandatory, (Resp. Br. 42-62; see also Media Br. 10-17, CLU Br. 7-24) and that Federal Rule of Civil Procedure 52(a) should have no application to such "independent appellate review." Resp. Br. 62-77; see also Media Br. 18-21, CLU Br. 19.

Petitioner agrees that "independent examination of the whole record," *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), is necessary and proper. But the "de novo review" actually conducted by the Court of Appeals (App. X22) violates not only Rule 52(a) but also the Due Process Clause of the Fifth Amendment. Pet. Br. 40-49, 61-70.

In the present case the Court of Appeals conducted a "de novo review" foreclosed by both Rule 52(a) and the Fifth Amendment, disregarding the trial court's findings on credibility of witnesses and giving credence to testimony which the trial court had found not credible.

But the requirement for an "independent examination of the whole record" does not allow the appellate court to conduct a "de novo review" of the transcripts of the testimony of witnesses to determine for itself, from the cold printed record, what testimony should be believed and what should not be believed.

Appellate review of the whole record must be a review of the evidentiary support for the facts found by the trial court, and not a de novo finding of facts from the evidence in the printed record.

In a bench trial, the determination

of "the facts of the case" must be entrusted to the Article III trial judge. He has seen and heard the witnesses during direct and cross examination (e.g., App. X141, J.A. 169), including their testimony about documentary exhibits prepared by them while testifying (e.g., PX29, PX35), and has questioned them to clarify points (e.g., J.A. 122-24). He thus is able "to evaluate the credibility of witnesses and weigh the evidence." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). *Accord, Rogers v. Lodge*, __ U.S. ___, ___, 73 L. ed. 2d 1012, 1021 (1982), citing the same passage from *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 287 (1982) we have quoted. Pet. Br. 41.

Petitioner submits that in a case governed by constitutional law (App. X22-23) which has been tried to an Article III judge who has made detailed findings of

fact in accordance with Rule 52(a), the proper standard of "independent appellate review" is this:

1. The appellate court must determine whether the *facts* found by the trial court are sufficient to support the judgment.

2. The appellate court must determine whether there is evidence, which, if believed by the trial court, is sufficient as a matter of law to support the findings of fact.

3. The appellate court must *not* make its own findings of fact *de novo* based upon evidence found in the printed record.

4. In determining whether the evidence could support the findings of fact, the appellate court must *not* attribute any weight to testimony at trial which the trial court found to be not credible, because Rule 52(a) "recognizes and rests

upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Laboratories*, 456 U.S. at 855. Appellate judges cannot question or observe witnesses.

Thus in a "public figure" libel case the appellate court must (1) ascertain whether or not the trial court found that the defendant published a false statement of fact with knowledge that it was false or with reckless disregard of its truth or falsity; (2) if the trial court found such facts, determine whether there was "clear and convincing" evidence which, if believed by the trial court, *could* support such findings; (3) avoid making any *de novo* findings of fact from the printed record; and (4) give no weight to testimony of witnesses which the trial court found to be not credible.

The standard of "independent review" set forth above is consistent both with the constitutional requirements for "independent examination of the whole record" set forth by this Court in *Edwards* and *New York Times*, and with the requirements of due process and Rule 52(a). Pet. Br. 40-49, 61-70.

We have shown that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" in Rule 52(a) is mandated by the Due Process of Law clause of the Fifth Amendment. Pet. Br. 61-70. Neither respondent nor any of its supporters has made any argument to the contrary in their briefs.

The appellate court should not review the evidence in the record to decide whether in the judgment of the appellate court the evidence *does* support the judg-

ment below, but instead should "review the evidence . . . to determine whether it *could* constitutionally support" the judgment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-285 (1964) (emphasis added).

The appellate court should determine whether there is "sufficient evidence to *permit* the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added), and not whether weighing the evidence in a "de novo review" persuades the appellate judges to the same conclusion reached by the trial judge.

If the case is tried to a jury rather than a judge and there is sufficient evidence to support a finding of actual malice, ". . . it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." *Time, Inc.*

v. Hill, 385 U.S. 374, 394 n.11 (1967).

The Ninth Circuit Court of Appeals followed this decision in adhering to the standard of "independent appellate review" which is described above. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *cert. denied*, ___, U.S. ___, 77 L. Ed. 2d 1350 (1983):

> Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases. We are satisfied that the trier could find, from the record as a whole, that . . . the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment. Whether we agree with the trier's finding of knowing falsity, or fall back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd.

That case demonstrates that an appellate court may examine "the trier's findings with the extra care required in such cases" in conducting an independent

examination of the "record as a whole" while still applying the "clearly erroneous" standards of Rule 52(a).

In the present case, the Court of Appeals failed to adhere to the standard of "independent review" set forth above.

Instead, it undertook a "de novo review (App. X22)" and asserted, "In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) . . . (App. X22)."

The Court of Appeals acknowledged that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact (App. X23)," but then proceeded to reverse the judgment for petitioner on the basis of testimony of an employee of the respondent which the trial court expressly had found to be "wholly untrustworthy" and "not credible (App. X163, n.33)."

With respect to the required proof of "actual malice," the Court of Appeals applied a rule of substantive law completely at variance with prior decisions of this Court. The Court of Appeals said:

> The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference . . .. A court typically will infer actual malice from objective facts . . .. These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case (App. X27-28).

The Court of Appeals cited no authority for the proposition that petitioner was required to "provide evidence of negligence, motive, and intent."

It is apparent that the Court of Appeals failed to recognize the well-established distinction between "actual malice" in the common law sense (where "motive" and "intent" lie at the heart of

"malice") and "actual malice" of the type required by *New York Times* -- knowledge that the statement was false or reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Annot., 61 L. ed. 2d 975, 995-96 (1980) and cases cited.

Seligson, the author of the false and disparaging statement on which liability was found, was an employee of respondent (App. X51). Since Seligson knew the statement was false, his knowledge of falsity must be attributed to respondent. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-254 (1974). Neither respondent nor its supporters have contended otherwise; their briefs do not cite or mention *Cantrell*.

Petitioner consistently has contended that Seligson *knew* that the statement was false when he wrote it; and that is

precisely what the District Court found to have been proved by clear and convincing evidence:

> [T]he Court further finds that at the time of the Article's publication Seligson *knew* that the words "individual instruments . . . tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." Consequently, the Court concludes, on the basis of *proof which it considers clear and convincing*, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact *with the knowledge that it was false* or with reckless disregard of its truth or falsity (App. X142-143; emphasis added).

"Clear and convincing" proof that Seligson knew that the statement was false -- testimony at trial of Seligson himself -- is described in our brief. Pet. Br. 10-11, 66-68. See also Pet. Br. 18-24, 27-28, 31, 50-61.

Petitioner was not required to prove "negligence, motive, and intent (App. X27-28)." It was sufficient to prove that

Seligson, who was the author of the statement and an employee of respondent, knew that it was false. The statement of the Court of Appeals that "Such evidence is lacking in this case," referring to evidence of "negligence, motive, and intent (App. X28)," shows that the Court of Appeals not only erroneously conducted a "de novo review," but also misconceived the meaning of the *New York Times* "actual malice" test.

The Court of Appeals then proceeded to an extensive analysis of the "editorial procedures (App. X32)" employed by respondent in reviewing Seligson's draft of the Article, with repeated references to the conduct and state of mind of the "associate technical director" of respondent (App. X33-34).

The evidence on which the Court of Appeals relied for its conclusion that

"CU's editorial procedures reveal no evidence of actual malice (App. X32)," was the testimony of Monte Florman (J.A. 195-221), who had been the associate technical director of respondent when the Article was prepared and published (J.A. 196), which testimony the trial judge had found to be "wholly untrustworthy" and "not credible (App. X163 n.33)."

The Court of Appeals also appeared to give credence to Seligson's testimony to the effect that he believed the false statement to be true when he wrote it (compare App. X34-35 with J.A. 124, 169-170), despite the District Court's express finding that Seligson's testimony on that point was "not credible (App. X142)."

Thus, in relying upon testimony of Florman and Seligson which the trial judge had found to be "not credible (App. X163 n.33, App. X142)," the Court of Appeals

disregarded the requirements of Rule 52(a) and the Fifth Amendment.

The findings that the testimony of Florman and Seligson was not credible cannot be deemed "clearly erroneous", or even erroneous. Their credibility was destroyed by cross-examination at trial. *Infra*. 33-39.

If appellate courts are allowed to conduct a "de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law" and "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) (App. X22)," the inevitable result will be less justice and more appeals as losing parties seek what amounts to a "new trial" in the Court of Appeals.

This result recently was recognized in Griswold, *Helping the Supreme Court by*

reducing the flow of cases into the courts of appeals, 67 JUDICATURE 58, 64 (August 1983):

> Independent review of facts by the courts of appeals. One aspect of activism which gives me concern is the extent to which appellate courts in our system now independently review the facts found by the district courts. Our system is supposed to proceed on a division of labor. The fact determinations are made in the district courts, either by jury or by the judge, as trier of the facts; and the courts of appeals are responsible for seeing that the law was correctly applied. Rule 52 of the Federal Rules of Civil Procedure, promulgated by the Supreme Court, provides that "Findings of fact shall not be set aside unless clearly erroneous." And a similar rule applies to an exercise of discretion by the district court.
>
> In recent years, however, the courts of appeals have more and more been undertaking comprehensive review of factual determinations by the district courts, and the Supreme Court has done little to change this practice. What are the consequences of this? They are numerous, but one of them is that very few counsel feel that they can drop a case even though the facts have been found against them in the district court. Under current practice, there is a

> considerable chance that counsel can persuade the court of appeals to undertake a general review of the facts, and to reach its own conclusion. This is, indeed, an example of the "reaching out" which has become endemic among the courts in recent years. It is, I suggest, a considerable factor in the volume of cases coming to the courts of appeals, and thus to the Supreme Court.

The rule stated by the Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-56 (1982), requiring an appellate court to accept the trial court's findings unless left with the "definite and firm conviction that a mistake has been committed," was recently supported in the comments accompanying the Preliminary Draft of Proposed Amendments to the FEDERAL RULES OF CIVIL PROCEDURE by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in August 1983. In urging uniform adoption of the clearly erroneous standard of review of findings

of fact, "whether based on oral or documentary evidence" giving due regard to both "the opportunity of the trial court to judge of the credibility of the witnesses and to the need for finality," the Committee Note said:

> Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 536 (1963).
>
> . . .
>
> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus

> eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

See also, Annot. 72 L. Ed. 2d 890, 894 (1983).

The instant case demonstrates the soundness of this reasoning. The District Court had the benefit of observing Seligson testify on six trial days (Tr. 6-111 through 11-80), Florman (Tr. 11-81 through 12-129) and Lefkow (Tr. 12-129 through 13-157) each testify on two days, and Dr. Bose testify on five trial days (Tr. 2-6 through 5-159, 19-68-160).

The District Court also conducted its own examination of the witnesses where

clarification of their testimony was desired (See, e.g., J.A. 56, 124, 166, 208, 219, 253-54), a procedure not available to an appellate court. Appellate judges should not have more power to determine the author's state of mind than the trial judge who actually heard him testify.

Due process requires that findings of fact not be set aside unless clearly erroneous. Pet. Br. 61-70. Adherence to the "clearly erroneous" rule maintains the legitimacy of the trial process in district courts in the eyes of litigants, reduces appeals by discouraging appellate retrial of factual issues, and enables the appellate courts to further reduce litigation through clear exposition of rules of law that govern the primary pre-litigation conduct of citizens to facilitate conformity therewith and thereby avoid litigation.

II. IN FINDING "ACTUAL MALICE", THE DISTRICT COURT DID NOT APPLY A "REASONABLE MAN" TEST, DID NOT EQUATE FALSITY PLUS INTELLIGENCE WITH ACTUAL MALICE, AND DID NOT RELY SIMPLY ON DISBELIEF OF SELIGSON, BUT FOUND "ACTUAL MALICE" BECAUSE IT FOUND THAT SELIGSON KNEW THAT WHAT HE WROTE WAS FALSE, AND BECAUSE IT DID NOT BELIEVE HIS TESTIMONY THAT WHAT HE WROTE DESCRIBED WHAT HE HAD OBSERVED.

At trial Seligson, the author of the false statement "Worse, individual instruments heard through the Bose system . . . tended to wander about the room (App. X145, X159-160)" drew a sketch to show what he had observed during the "special listening test (PX 29, J.A. 342; J.A. 149-160)." It showed that he heard the sounds of a violin coming from various points between the two Bose loudspeakers (J.A. 158-159).

On cross-examination he was asked why he had used the words "tended to wander about the room" to describe what he had drawn (J.A. 169) and he replied:

> The word "about" meant just as I drew it on the board (J.A. 169).

He earlier had testified that the word "about" as used in the false statement "was meant to mean about the rear wall, between the speakers," but took no issue with the Court's observation that "That isn't what it says, though (J.A. 124)."

The District Court made note of Seligson's testimony as to what "wander about the room" meant to him and said:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned (App. X142).

Using that language of the District Court as a springboard, respondent and its supporters leap to the following arguments:

(a) That the District Court

improperly applied a "reasonable man" test in finding actual malice. Resp. Br. 65, 66, 69, 72-74; Media Br. 19, n.11.

(b) That the District Court simply equated the intelligence of Seligson plus the falsity of the statement with "actual malice." Resp. Br. 32, 71; CLU Br. 27.

(c) That the District Court relied upon only disbelief of Seligson as the basis of finding "actual malice." Resp. Br. 41, 102-103; CLU Br. 24-25.

Petitioner agrees that the state of mind required for "actual malice" is actual knowledge of falsity (or reckless disregard for the truth), and not what "an ordinarily prudent man" would have believed. See, *e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 73, (1964).

Petitioner agrees that a finding that the author of false statement was an intelligent person would not, standing

alone, be sufficient to prove "actual malice."

And petitioner agrees that disbelief of the testimony of a witness, without more, is not sufficient to support an affirmative finding to the contrary.

But the arguments made by respondent and its supporters simply ignore and disregard the essential evidence which led the District Court to its conclusion that petitioner had proved "actual malice" by "clear and convincing evidence (App. X142-143):" Seligson's testimony as to what he actually heard during the special listening test (J.A. 158-159).

The trial judge's finding that Seligson's testimony, to the effect that he believed that what he wrote accurately described what he had observed (J.A. 124, 147, 169), was not credible (App. X142-143) was only the last link in the chain.

A simple parable may serve to put the arguments of respondent and its supporters into proper perspective. Let us assume the following facts:

1. Bowes, the mayor of a large city (and clearly a "public figure"), is indicted and tried for the crime of accepting bribes from contractors who did business with the city.

2. The jury returns a verdict of "not guilty" on all counts.

3. On the following day, the local newspaper publishes an article which says, "Yesterday afternoon Mayor Bowes was convicted by a jury of accepting bribes from contractors who did business with the city."

4. Bowes sues the publisher of the newspaper for libel. Bowes concedes that he is a "public figure" but contends that the defendant has published a false

statement with "actual malice" -- with knowledge that the statement was false.

5. At trial of the libel action, to a judge without a jury, Arnold L. Scoop testifies as follows:

> My name is Arnold L. Scoop. I have been employed by the defendant publisher as a reporter for 25 years. I have been covering criminal trials in the local courts for 25 years. I am familiar with court procedures. I am a graduate of Harvard College and the Columbia School of Journalism (Compare App. X50-52).
>
> I wrote the article which said that Mayor Bowes had been "convicted." I was in the courtroom when the jury verdict was announced, and I heard the foreman of the jury say "not guilty on all charges." I used the word "convicted" in my article because the word "convicted" meant just what I heard in the courtroom. The word "convicted" was meant to mean "found not guilty. (Compare App. X141, J.A. 124, 169)." I still believe the article was accurate and not misleading (Compare J.A. 147).

6. The trial judge makes the following findings:

If Scoop is to be believed, at the time of publication of the article he interpreted, and he still interprets today, the word "convicted" to mean "found not guilty (Compare App. X141-142)."

After careful consideration of Scoop's testimony and of his demeanor at trial, the Court finds that Scoop's testimony on this point is not credible. Scoop is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible to believe that he interprets a commonplace word such as "convicted" to mean anything other than its plain ordinary meaning (Compare App. X142).

Based on the above finding that Scoop's testimony to the contrary is not credible, the Court further finds that at the time of the article's publication Scoop knew that the word "convicted" did not accurately describe what he heard in the courtroom. Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained his burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity (Compare App. X142-143).

On the facts set forth in the hypothetical example above, can there be any

doubt that the trial judge was warranted in finding clear and convincing evidence of "actual malice?" The author has admitted that what he wrote was different from what he actually heard.

But let us carry our parable one step further:

7. The defendant publisher appeals from a judgment for Mayor Bowes to an appellate court. The appellate court reviews the evidence at trial, notes that there was evidence that the article written by Scoop was reviewed by the editor of the newspaper and several other employees of the newspaper before it was published, observes that Scoop testified without contradiction that he thought that "convicted" meant "just what he heard in the courtroom (found not guilty)," disregards the trial judge's finding that such testimony was not credible, and rules

that the plaintiff has failed to prove by "clear and convincing evidence" that the defendant published the false statement with knowledge that it was false or with reckless disregard of its falsity. The appellate court further says that in using the word "convicted" the defendant may have "been guilty of using imprecise language (compare App. X35)," but that this does not support an inference of actual malice, because in fact Bowes was indicted and tried for a crime and the "editorial procedures" of the defendant reveal no evidence of actual malice (compare App. X32).

Can there be any doubt that the decision of the appellate court is erroneous, where the author of the article has admitted that he heard the "not guilty" verdict announced and the trial judge has found his testimony that he thought

"convicted" meant "just what he heard in the courtroom (found not guilty)" was not credible?

What respondent and its supporters have ignored in their arguments is the fact that the District Court after hearing Seligson testify as to what he actually observed during the "special listening test," found that Seligson *knew* that what he wrote was not true (App. X142-143).

No amount of argument about principles of constitutional law can overcome the fact respondent published a false and disparaging statement of fact which the author, its employee, knew to be false.

III. THE DIFFERENCE BETWEEN THE FALSE STATEMENT ATTRIBUTING BIZARRE AND GROTESQUE QUALITIES TO THE BOSE SYSTEM AND THE TRUTH OF OBSERVING NORMAL STEREO SOUND WAS NOT TRIVIAL.

The Media Brief in its Conclusion, Media Br. 21, suggests that there was only

a slight distinction between the words "Worse[2], individual instruments heard through the Bose system . . . tended to wander about the room" used by respondent and the phrase "tended to wander along the wall" (which the writer suggests "the trial court would have held nonactionable"), and points to the alleged "triviality of these verbal distinctions." Media Br. 21.

In fact, the difference betwen what the "panelists" Seligson and Lefkow testified they actually observed and what Seligson wrote the "panelists" observed was far from "trivial".

The difference between what Seligson and Lefkow actually observed and the phenomenon described in the false and disparaging statement published by

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[2]Respondent and its supporters ignore the impact of the word "Worse." Resp. Br. 27-29, 35, CLU Br. 4-6, Media Br. 5-7. Compare App. X105-06.

respondent is not merely a difference in degree or one of exaggeration. It represents a transition from the real world of normal stereo sound into a Twilight Zone that is bizarre (App. X101), grotesque (App. X105), and scientifically impossible (J.A. 28). Pet. Br. 9-15, 18-19, 55, 58-59, 66-68.

IV. THE FINDINGS BY THE DISTRICT COURT THAT FLORMAN'S TESTIMONY WAS WHOLLY UNTRUSTWORTHY AND NOT CREDIBLE AND THAT SELIGSON'S TESTIMONY WAS NOT CREDIBLE WERE NOT CLEARLY ERRONEOUS.

On at least five occasions the Court admonished Florman for being evasive (Tr. 12-4, 12-5, 12-20, 12-30, 12-36, 12-37, 12-48).

We turn now to specific instances which support the finding of the District Court that Florman's testimony was wholly untrustworthy and not credible (App. X163).

(a) Florman contradicted himself in

first denying and then admitting that at the June 3, 1970, meeting at respondent's laboratories Dr. Bose specified what was wrong with the Article (Tr. 11-98, 11-104, 11-105, 11-111-112, 11-114, 11-116-118, J.A. 209-13).

(b) Florman contradicted himself overnight at trial in first admitting and then denying authorizing Seligson to proceed with exploiting his patented loudspeaker (Tr. 11-85-86, 11-90-91, 12-7).

(c) Florman contradicted himself in first denying and then admitting that he had seen a copy of Seligson's patent before his deposition was taken in this case on December 18, 1975 (Tr. 11-119-20, 11-125, 12-3-6).

(d) Florman testified that prior to June 3, 1970, Seligson never had informed him that the invention described in Seligson's patent as a loudspeaker (PX 11,

Tr. 123, 125, Tr. 11-121-22), was a loudspeaker, and never believed that it was a loudspeaker (Compare Tr. 11-120-23 with Tr. 138, 9-40). Seligson had testified that he told Florman that the patent was on a loudspeaker (Tr. 138, 9-40).

(e) Florman contradicted himself in first testifying unequivocally that Seligson had told him that a model of Seligson's invention never had been completed and then denying so testifying (Tr. 12-23, 12-25-29).

(f) Florman testified at trial that during the course of a listening test of the Bose 901 loudspeakers in respondent's laboratories on June 16, 1970, he discussed what he heard with then technical director Kaplan (Tr. 12-79), in conflict with his prior deposition testimony to the effect that there had been "no discussions

during the test (Tr. 12-80-81)." See also Tr. 12-85-91, DX B-E, Tr. 11-109, 11-111.

The finding of the District Court that Seligson's testimony that he believed that the false statement accurately described what he had observed (J.A. 124, 147, 169) was not credible (App. X141-142) was not clearly erroneous.

Seligson's own testimony about what he had observed (J.A. 124, 149-160) was irreconcilable with what he wrote.

But that was not the only evidence leading to the conclusion that his testimony was not credible. On several occasions the court admonished Seligson for evasion or argument in his response to questions (Tr. 9-44, 9-57, 9-58, 10-105, 10-106).

(a) In his pretrial deposition testimony, Seligson testified that he and Lanier, a former employee of respondent,

completed a model of their patented loudspeaker (Tr. 131A, 9-43, 11-28), but at trial he denied completing it (Tr. 9-42). See also Tr. 11-29-30.

(b) His testimony was inconsistent as to whether or not he and Lanier continued working on the invention after Lanier left the employ of respondent (Compare Tr. 8-50 with Tr. 9-59-60).

(c) At trial he testified that Shair, a former employee of respondent, had been one of the two "panelists" who participated in the "cricket test" (Tr. 6-126, 7-20, 7-23, 9-88, 9-92, 11-25), in conflict with his deposition testimony that Shair did not participate in the loudspeaker evaluation project (Tr. 9-94-95).

(d) Seligson also lied about references to a loudspeaker causing a musical instrument to wander about the room in

published articles (Compare Tr. 10-72, 10-77) with Tr. 10-97-100, J.A. 192-93).

(e) Furthermore, Seligson was deliberately evasive as to who had selected himself and Lefkow to be the "panelists" for the "special listening test," but finally admitted that he had (Tr. 7-23, 9-129, J.A. 97).

(f) He testified on direct examination that he had received a letter from petitioner (DX B-S. Tr. 8-63, 8-64) which he said "seemed like a job offer (Tr. 8-62). On cross-examination he not only contradicted that testimony, but also denied that he had so testified (Tr. 10-129).

These examples of Seligson's conflicting, evasive and argumentative testimony slanted to favor what he perceived as the best interest of respondent at any

given moment lends support to the District Court finding on actual malice, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)." This finding is hardly a finding that Seligson "was not to be believed soley because he 'is an intelligent person whose knowledge of the English language cannot be questioned.'" Resp. Br. 32.

V. THE DISTRICT COURT FOUND THAT RESPONDENT NOT ONLY DECEIVED CONSUMERS IT PLEDGES TO SERVE BY MAKING A FALSE AND DISPARAGING STATEMENT ABOUT PETITIONER'S BOSE 901 LOUDSPEAKER, BUT ALSO IN FALSELY REPRESENTING IT RATED THE LOUDSPEAKERS BY OBJECTIVE STANDARDS AND MISLEADINGLY USING "PANELISTS."

Respondent contends that respondent's "very favorable reputation for independence, integrity, accuracy, and freedom from bias (App. X4, X45)" is "well-deserved," in its argumentative "Statement of the Case." Resp. Br. 2-3 n.2.

In addition to finding that respondent knowingly falsely disparaged the Bose 901 loudspeaker, the District Court found that the Article made other false and misleading statements. The District Court found:

> The Court agrees with the plaintiff that the Article implies that the accuracy of the tested loudspeakers was determined in an objective fashion. CU's statement that "(l)oudspeaker quality . . . can be measured in the lab . . . ," creates the impression that such measurements made in a laboratory are objective ones, rather than the type of subjective judgments made by Seligson. The Court also agrees that the foregoing implication was false. The fact that objective scores were determined is of little consequence in view of the fact that Seligson subsequently altered those objective scores to conform to his subjective judgments. In addition to the fact that the tests that were performed on the conventional loudspeakers lacked objectivity, no objective scores at all were determined for the Bose 901 or for the HK-50 loudspeaker (App. X76-77).

"Panels"

The words "panel" and "panelists" appear throughout the Article, especially in the Bose 901 Portion. The Article does not explain, however, that there were in fact three different panels involved in testing the loudspeakers -- the "A-B listening test" involved a panel of five CU employees, the "cricket test" utilized a panel of two CU employees, and the "special listening test" involved only Seligson and Lefkow. The plaintiff claims that CU's use of the words "panel" and "panelists" without explaining that three different panels were involved was misleading. It was also misleading, according to the plaintiff, for CU to use the word "panel" when referring to only two people. Seligson himself testified that the use of the word "panel" to describe two persons could be "possibly a mite misleading." Tr. 9-89.

While the Court agrees that CU's use of the words "panel" and "panelists" was misleading to the readers of the Article, it is difficult to see what harm such misleading use of terms caused the plaintiff (App. X70-71).

VI. PETITIONER INTRODUCED EVIDENCE OF THE TWELVE YEARS OF RESEARCH BEHIND THE BOSE 901 LOUDSPEAKER AND RESPONDENT'S "RESEARCH DATA."

Respondent falsely states:

Consumers Union produced at trial

> all of its research data and editorial material. Bose produced nothing; Resp. Br. 93-94.

In fact, petitioner introduced over respondent's objections (Tr. 2-74) reprints of articles describing the twelve years of research behind the BOSE 901 loudspeaker system (PX18, Tr. 2-74, 2-75).[3]

Furthermore, petitioner introduced a number of the project data books containing the results of the tests and measurements conducted by respondent in its laboratories (PX8, Tr. 59, PX15, Tr. 149, 150; PX16, Tr. 151; PX17, Tr. 152). Petitioner also introduced the notebook Seligson kept documenting his research on his patented loudspeaker (PX12, Tr. 130).

Petitioner also introduced into

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[3]Ten copies of PX18 have been deposited with the Clerk for the convenience of the Court.

evidence a measurement made by Dr. Bose demonstrating that one reflection could not be much stronger than the direct sound (PX40, Tr. 19-99, 19-109; PX41, Tr. 19-106, 19-109).

VII. THE "STANDARDS OF VERBAL ACCURACY" REQUIRED OF PUBLISHERS ARE BY NO MEANS IMPOSSIBLE TO ARTICULATE OR TO MEET.

The Media Brief contends that the First Amendment rights of authors and publishers would be "threatened" by a rule of law which would subject them to "standards of verbal precision that are as impossible to articulate as they are to meet," Media Br. 3, and offers a dire prophecy that reversal of the Court of Appeals decision in the present case "would threaten all journalism." Media Br. 21.

Petitioner respectfully suggests that the "standards of verbal accuracy" which authors and publishers are required to meet are not impossible to articulate.

They may be found in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964): He who publishes a false statement of fact with knowledge that it is false, or with reckless disregard for whether it is false or not, risks liability for damages for the harm caused by that false statement.

To articulate those standards is possible, for this Court has done it. To meet those standards may require some modest degree of honesty, integrity, and care on the part of those who write and publish. We should expect no less from those persons who possess the awesome power to ruin personal reputations and destroy business enterprises by reckless use of the printed word.

The law as developed through decisions of this Court during the past twenty years does not even require that publishers speak the truth. All it requires

in the case of "public figures" is that publishers not print deliberate or reckless falsehoods. If such a rule "would threaten all journalism," Media Br. 21, then journalism threatens all of us.

CONCLUSION

For the foregoing reasons and those advanced in our brief, the judgment of the Court of Appeals should be reversed, with instructions to affirm the District Court judgment for petitioner on liability and to conduct its review of the findings on damages in conformity with the requirements of Rule 52(a).

Respectfully submitted,

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No. 82-1246.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSE CORPORATION,
PETITIONER,
v.
CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Motion for Leave to File Brief and Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae.

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Motion of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts for Leave to File Brief as Amici Curiae.

The American Civil Liberties Union and the Civil Liberties Union of Massachusetts respectfully move for leave to file the attached brief as *amici curiae*. The respondent, but not the petitioner, has consented to the filing of this brief.

The American Civil Liberties Union (hereinafter "ACLU") is a nationwide, non-partisan organization of over 250,000 members. Founded over sixty years ago, ACLU is dedicated to preserving and protecting the fundamental principles embodied in the Bill of Rights. The Civil Liberties Union of Massachusetts (hereinafter "CLUM") is one of ACLU's state affiliates, a private, non-profit, membership-only organization

having approximately 9,500 members in the Commonwealth of Massachusetts. CLUM has as its purpose the preservation of rights and liberties protected both by the Constitution of the Commonwealth of Massachusetts and the Constitution of the United States. For a considerable time, both ACLU and CLUM have been actively involved in efforts designed to ensure that the people of the United States and of the Commonwealth have the broadest possible latitude within which to exercise their undoubted right to speak with impunity about all matters of public interest or importance.

Amici believe that the opinion and judgment of the district court in this case were in irreconcilable conflict with the overriding principle that speech on public affairs "should be uninhibited, robust and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The power of the Court of Appeals to remove that conflict by making an independent constitutional judgment that the record did not contain "clear and convincing" evidence of respondent's knowledge of falsity at the the time of publication, represents an important aspect of the protections for First Amendment rights this Court has historically endorsed. Indeed, independent review of "constitutional facts" and of the powers by which those facts are found is but a reflection of a reviewing court's obligation to ensure that constitutional principles are constitutionally applied. To entrust to the trial court near-final power to find the facts *and* to determine that the facts have been properly found would create a grave danger of erosion of constitutional rights through distorted fact-finding. Independent review of the type exercised by the Court of Appeals here is the only sure way to check that danger.

In sum, *amici* believe that resolution of the "procedural" issues riding on the surface of this case can have very important consequences for the substantive First Amendment rights those procedural issues concern. To present the foregoing views in this important First Amendment case, ACLU and

CLUM respectfully move for leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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Table of Contents.

Interest of amici	1
Statement of the case	1
Summary of argument	2
Argument	4
I. Introduction	4
II. The court of appeals properly made an independent judgment concerning whether "actual malice" had been shown on the record by "clear and convincing" evidence	7
A. The court of appeals' independent judgment was properly exercised because of its obligation to insure that constitutional principles are constitutionally applied	7
B. Even if the rule requiring proof by "clear and convincing" evidence is not of constitutional dimension, the court of appeals properly exercised its independent judgment to determine whether that standard had been met	19
III. The court of appeals correctly concluded that Bose had not proved CU's actual malice by clear and convincing evidence	24
Conclusion	27

Table of Authorities Cited.

Cases.

Addington v. Texas, 441 U.S. 418 (1979)	15, 16, 18n, 20, 23
Ashe v. Swenson, 397 U.S. 436 (1970)	15
Baumgartner v. United States, 322 U.S. 665 (1944)	21, 23
Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970)	25n

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 10
Branti v. Finkel, 445 U.S. 507 (1980) 11
Cantwell v. Connecticut, 310 U.S. 296 (1940) 13n
Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968) 15
Chambers v. Florida, 309 U.S. 227 (1940) 12n
Chaunt v. United States, 364 U.S. 350 (1960) 21
Colorado v. New Mexico, ___ U.S. ___, 51 U.S.L.W. 4045 (U.S., December 13, 1982) (No. 80, Orig.) 20n
Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 16, 17
Connick v. Myers, ___ U.S. ___, 51 U.S.L.W. 4436 (U.S., April 20, 1983) (No. 81-1251) 11, 14n
Costello v. United States, 365 U.S. 265 (1961) 21
Cox v. Louisiana, 379 U.S. 536 (1965) 12
Culombe v. Connecticut, 367 U.S. 568 (1981) 12
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 10
Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 16
Drope v. Missouri, 420 U.S. 162 (1975) 12n, 14
Eaton v. City of Tulsa, 415 U.S. 697 (1974) 13n
Edwards v. South Carolina, 372 U.S. 229 (1963) 12
Elrod v. Burns, 427 U.S. 347 (1976) 11
Federal Insurance Co. v. Summers, 403 F.2d 971 (1st Cir. 1968) 25n
Fedorenko v. United States, 449 U.S. 490 (1981) 20, 22
Fiske v. Kansas, 274 U.S. 380 (1927) 12n, 23n
Freedman v. Maryland, 380 U.S. 51 (1965) 15
FTC v. Standard Oil Company, 449 U.S. 232 (1980) 20n
Garrison v. Louisiana, 379 U.S. 64 (1964) 25, 27n
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 10n

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) 10
Haynes v. Washington, 373 U.S. 503 (1963) 12n, 14
Helvering v. Tex-Penn Oil Co., 300 U.S. 481 (1937) 23n
Henderson v. Morgan, 426 U.S. 637 (1976) 12n
Herb v. Pitcairn, 324 U.S. 117 (1945) 11n
Herman & MacLean v. Huddleston, ___ U.S. ___, 51 U.S.L.W. 4099 (U.S., January 24, 1983) (Nos. 81-680, 81-1076) 20, 23
Hess v. Indiana, 414 U.S. 105 (1973) 13n
In re Little, 404 U.S. 553 (1973) 13n
In re Winship, 397 U.S. 358 (1970) 16, 20, 23
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 17
Jacobellis v. Ohio, 378 U.S. 184 (1964) 13n
Janigan v. Taylor, 344 F.2d 781 (1st Cir.), cert. denied, 382 U.S. 879 (1965) 25n
Jenkins v. Georgia, 418 U.S. 153 (1974) 13n, 14
Kois v. Wisconsin, 408 U.S. 229 (1972) 14, 15
Louisiana v. Cox, 244 La. 1087, 156 So. 2d 448 (1963) 12n
McNabb v. United States, 318 U.S. 332 (1943) 28
Miller v. California, 413 U.S. 15 (1973) 14
Moore v. Chesapeake & Ohio Ry., 340 U.S. 573 (1951) 25n
Moore v. Michigan, 355 U.S. 155 (1957) 12n
NAACP v. Claiborne Hardware Co., ___ U.S. ___, 50 U.S.L.W. 5122 (U.S., July 2, 1982) (No. 81-202) 13, 14n
National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6, 7, 8, 9n, 15 et seq.
Nishikawa v. Dulles, 356 U.S. 129 (1958) 21, 24

NLRB v. Gotham Industries, Inc., 406 F.2d 1306 (1st Cir. 1969) 25n

NLRB v. Joseph Antell, Inc., 358 F.2d 880 (1st Cir. 1966) 25n

Pennekamp v. Florida, 328 U.S. 331 (1946) 13n

Pickering v. Board of Education, 391 U.S. 563 (1968) 11

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 17, 18, 22n, 23

Rogers v. Lodge, ____ U.S. ____, 50 U.S.L.W. 5041 (U.S., July 1, 1982) (No. 80-2100) 17

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 10, 15

St. Amant v. Thompson, 390 U.S. 727 (1968) 10, 25, 27n

Santosky v. Kramer, 455 U.S. 745 (1982) 18n, 20, 23

Schneiderman v. United States, 320 U.S. 118 (1943) 20, 21

Smith v. California, 361 U.S. 147 (1959) 14n

Speiser v. Randall, 357 U.S. 513 (1958) 15, 18

Steadman v. SEC, 450 U.S. 91 (1981) 23

Stovall v. Denno, 388 U.S. 293 (1967) 12n

Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) 6

Time, Inc. v. Pape, 401 U.S. 279 (1971) 8, 9, 26

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 13n

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 13

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 17n

United States v. Wade, 388 U.S. 218 (1967) 20n

Vance v. Terrazas, 444 U.S. 252 (1980) 23

Watts v. Indiana, 338 U.S. 49 (1949) 14

Watts v. United States, 394 U.S. 705 (1969) 13n

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966) 20

STATUTES.

United States Constitution
First Amendment 2, 3, 6, 8, 9 et seq.
Fourteenth Amendment
Due Process Clause 9, 12n
Fed.R.Civ.P. 52(a) 7, 17, 18n, 19, 28

MISCELLANEOUS.

Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191 14n
Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970) 14n, 15
Restatement (Second) of Torts
§ 580A, comment d 15n
§ 581A 14n
Schauer, Fear, Risk and the First Amendment: Unravelling the "Chilling Effect," 58 B.U. L. Rev. 685 (1978) 20

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Brief of the American Civil Liberties Union of Massachusetts as Amici Curiae.

Interest of Amici.

The interest of *amici curiae* is set forth in the motion attached to this brief.

Statement of the Case.

Amici adopt the statement of the case presented by respondent, Consumers Union of United States, Inc., (hereinafter "CU").

Summary of Argument.

This is a case in which the United States District Court for the District of Massachusetts, after a lengthy bench trial, concluded that the First Amendment to the Constitution of the United States did not protect CU's use of the word "about" to describe the location from which the sound of musical instruments appeared to come when one listened to those instruments played through loudspeakers manufactured by petitioner, Bose Corporation (hereinafter "Bose"). In reversing that judgment, the United States Court of Appeals for the First Circuit concluded, after its independent review of the entire record, that the First Amendment did protect CU's use of the word because Bose had not proved by "clear and convincing evidence" that CU knew it was making a false statement of fact when that word was published (pp. 4-7).

In coming to an independent judgment that the record contained no "clear and convincing evidence" of CU's knowledge of falsity at the time the relevant word was published, the court of appeals exercised the proper scope of review in cases like this. As is discussed in Part IIA of this brief, the requirement that knowledge of falsity be proved by "clear and convincing evidence" is a requirement which stems directly from the First Amendment itself. Indeed, that requirement is an important element of the process by which speech protected by the First Amendment is separated from speech which is not.

Recognizing its obligation to ensure that constitutional principles are constitutionally applied, this Court has, on numerous occasions, reviewed the entire record in cases involving First Amendment freedoms to come to an independent constitutional judgment on the facts the record contains. Sometimes it has done so because the constitutional rule of decision would admit of no other approach. More often, it has done so because the rule of decision, although couched in fact-like form, was not fully self-defining and thus required an inde-

pendent constitutional judgment in order to ensure that speech had not been impermissibly penalized.

Undoubtedly, the process by which "constitutional facts" are found in the trial court has important consequences for the underlying constitutional rights at issue. The rule requiring proof by "clear and convincing" evidence in cases like this is an important part of that process. But application of the rule is not a ministerial task. The terms themselves contain no certain guide to their precise application and thus gain meaningful form only through application to individual cases. The obligation to ensure that constitutional principles are constitutionally applied thus requires exercise of independent judgment by a reviewing court so that the "clear and convincing" rule remains the barrier against erosion of the First Amendment freedoms it was designed to be (pp. 7-19).

Even if, unlike the "actual malice" standard it is designed to serve, the "clear and convincing" rule does not stem from the Constitution itself, Part IIB of this brief discusses why independent review of the type exercised by the court of appeals was nonetheless proper. The "clear and convincing" rule embodies a choice concerning the outcome of legal disputes, a choice based on the relative importance of the values those disputes involve. The need to ensure proper recognition of those values historically has triggered independent review by this Court of the basis for trial-court findings the "clear and convincing" rule governed. Indeed, the values inherent in the rule undoubtedly would be exposed to serious erosion were its execution left to the virtually unreviewable care of triers of fact, those whose conduct it is intended to guide (pp. 19-24).

Finally, Part III of this brief discusses the court of appeals' proper conclusion that the record in this case simply did not contain "clear and convincing evidence" of CU's knowledge of the falsity of the word "about." The trial court's contrary conclusion proceeded on its disbelief of one of CU's employees coupled with its belief that that employee was too intelligent to accidentally misuse the word. But disbelief of testimony does

not amount to affirmative evidence of a contrary fact, much less "clear and convincing evidence" of the type here required. Moreover, the CU employee whose testimony the trial court disbelieved was not the one who first used the relevant word. Finally, in relying on the ordinary meaning of the word "about," the trial court impermissibly substituted an objective standard of knowledge for the subjective standard the Constitution requires (pp. 24-27).

Argument.

I. Introduction.

After an "exceedingly protracted period of pretrial discovery" and after nineteen days of trial (App. X. 39), the United States District Court for the District of Massachusetts, sitting without a jury, concluded that CU falsely had used the word "about" in its six-hundred and fifty word article about Bose stereophonic speakers. The court appeared to conclude that CU should have used the word "across," for "across" the room or "along the wall," and not "about" the room, is where it found that the sound of musical instruments played through the Bose speakers had "wandered" (App. X. 141-142).[1] The court then concluded that CU knew that its use of the word "about" was false because Arnold Seligson, one of two CU employees who heard the wandering sounds, was too intelligent to "interpret[ ] a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning." (App. X. 142.)

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[1] The word "about" appeared in the following sentence: "Worse, individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." (App. X. 49.) The court found that Bose had not proved that the phrase "seemed to grow to gigantic proportions" was false (App. X. 88-99). The court also found that the use of the verb "wander" was accurate (App. X. 102).

Subsequently, after another three days of trial, judgment in the amount of $115,000 entered in favor of Bose.[2]

In the main, the CU article at issue was a verbal translation of various aural phenomena experienced by CU's employees while listening to Bose speakers. As the district court itself seemed to recognize, such efforts at translation are bound to breed at least some imprecision (App. X. 87 & n.29). *See also* J.A. 328-330. Indeed, before concluding that the word "about" had been falsely used, the district court felt it necessary to create the lexicon it intended to use while analyzing the truth or falsity of the statements CU had made (App. X. 87-88). The court's perceived need to do so undoubtedly reflected the fact that "there are no words to describe all of the aesthetic aspects of sound." (J.A. 336-337 (Testimony of Amar Bose).)

The judgment in favor of Bose thus came as the result of an article which attempted to verbalize non-verbal phenomena. It came as the result of an article in which, because of the inherently subjective nature of any effort to verbalize non-verbal phenomena — particularly phenomena received from "unique and unconventional" stereo speakers (App. X. 43) — the statement at issue may well have been a statement of opinion and not of fact.[3] It came as the result of a statement which, in fact, may well have been true.[4] And it came as the result of a

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[2] With interest and costs, the total amount of the judgment exceeded $200,000 (J.A. 344-345).

[3] The court of appeals simply assumed for purposes of its decision that the statement was one of fact and not of opinion (App. X. 15-18, 20). That, as the court itself recognized, was a large assumption. The difference between hearing "instruments [which] tended to wander . . . about the room" and hearing, for example, "instruments which danced from place to place like a fawn through the green spring meadow" is the difference between someone who liked what he heard and someone who did not.

[4] Again, the court of appeals assumed for purposes of its decision that the statement was false (App. X. 19-20), although it expressly recognized that it may well have been true. *Id.* Once again, the court's ambivalence was appropriate. The record clearly reveals that there was some depth to the

conclusion by the district court that the "plain, ordinary meaning" of a "commonplace word such as 'about'" (App. X. 142) was too clear to admit of mistake.

Thus viewed, the district court's opinion and judgment are a paradox. On one hand, the court's unchallenged conclusion that Bose was a "public figure" for purposes of this action[5] necessarily was a conclusion that the First Amendment permitted — indeed, encouraged — speech about the Bose speakers which was "uninhibited, robust and wide-open [sometimes including] vehement, caustic and . . . unpleasantly sharp attacks." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). That, after all, is the guiding principle which the rules regarding liability of those who speak about "public figures" were designed to serve.

On the other hand, the judgment in this case is an implicit endorsement of an exceedingly narrow and crabbed view of what the First Amendment protects, a view at war with the basic principle discussed in *New York Times* itself. If permitted to stand, that judgment and the method used to reach it would shrink the boundaries of the First Amendment to an area encompassing only "an arid, dessicated recital of bare facts." *See Time, Inc.* v. *Johnston*, 448 F.2d 378, 384 (4th Cir. 1971). Indeed, in cases like this one where the "bare

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wandering heard by Seligson and the other CU employee who listened to the Bose speakers (J.A. 254-255, 342, 343; App. X. 100). Indeed, to the extent that the word "across" or the word "along" implies a strictly linear movement, that word was itself not a precise description of what the two men heard.

[5] Not having challenged the trial court's conclusion in the court of appeals, Bose cannot, and has not, challenged it here. Bose's decision reflects reality. As part of its marketing efforts, Bose solicited reviews of its speakers by professional reviewers and then publicly distributed some seven *million* copies of those reviews in order to convince individuals that they ought to buy the speakers it made (R.A. 43-44 & n.6). Bose itself thus aggressively sought to make the quality and performance of its speakers an issue for public comment, albeit public comment which it undoubtedly hoped would be uniformly favorable.

facts" require one to verbalize an auditory or other non-verbal sensation, that judgment would make dangerous any statement at all.

But the business of appellate courts — indeed, the chief reason for their very existence — is to correct judgments of liability which depart from the principles, general or specific, on which liability ought to turn. In this case, an important principle of liability is the requirement that knowledge of falsity be shown on the record by "clear and convincing" evidence. It simply was not. And neither the "clearly erroneous" standard embodied in Fed.R.Civ.P. 52(a) nor anything else prevented the court of appeals from saying just that. Indeed, any other conclusion would have a crippling effect on execution of the fundamental principles embodied in this Court's decision in *New York Times*.

II. The Court of Appeals Properly Made an Independent Judgment Concerning Whether "Actual Malice" had been Shown on the Record by "Clear and Convincing" Evidence.

A. *The Court of Appeals' Independent Judgment was Properly Exercised Because of its Obligation to Insure that Constitutional Principles are Constitutionally Applied.*

As it began the critical portion of its opinion, the court of appeals said that its proper "focus [was] on the district court's holding that Bose *proved by clear and convincing evidence* that CU published the words 'individual instruments . . . tended to wander about the room' with knowledge that they were false or with reckless disregard of their truth or falsity." Continuing, the court said:

> In performing this review we are not limited to the clearly erroneous standard of Fed.R.Civ.P. 52(a); instead, we

> must perform a *de novo* review, independently examining the record to ensure that the district court has applied properly the governing constitutional law *and that the plaintiff has indeed satisfied its burden of proof*. . . . At the same time, we recognize that we are in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact.

(App. X. 22-23) (emphasis added).[6]

As support for the proposition that it was required to examine independently the entire record, the court of appeals cited, among other cases, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 & n.26 (1964); and *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971). Those citations were entirely proper and mark an appropriate place to begin.

As this Court will recall, the question presented in *New York Times* was whether the First Amendment permitted L.B. Sullivan, one of three elected commissioners of the City of Montgomery, Alabama, to recover a judgment for libel against the *New York Times* under the common law of Alabama, common law which permitted a finding of liability without any showing of fault and without proof that Sullivan had been expressly targeted in any of the published remarks. This Court concluded that the First Amendment did not permit such a judgment and, in the process, announced the now well-known rule of "actual malice" which governs recovery for libel by public officials.

This Court did not stop, however, with announcement of a general rule. After stating that reversal of the judgment was required because the just-announced liability rules had not

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[6] The emphasized language was not simply a casual phrase tucked into the middle of the court's opinion. The court said it was focusing on whether Bose had met its burden of proof at the beginning of its analysis (App. X. 22), in the middle of its analysis (App. X. 23, 25-26), and again at the end (App. X. 34). In addition, the authorities it cited for the scope of the review it was undertaking (App. X 23), all discuss the requirement of "clear and convincing" proof.

been followed, the Court said that, because a new trial might be sought, it was appropriate "to review the evidence in the . . . record to determine whether it could constitutionally support a judgment." *Id.* at 284-285. Explaining, it continued by saying:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Id. at 285 (citations omitted).

Following its independent examination, this Court concluded, among other things, that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence . . . it would not constitutionally sustain the judgment for respondent under the proper rule of law." *Id.* at 285-286.[7]

In *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant which the Court of Appeals for the Seventh Circuit had reversed. This time the issue was whether, given the evidence presented during the

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[7] This Court also concluded, again based on that independent examination, that the evidence was constitutionally "incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning'" Sullivan, notwithstanding the testimony of several individuals to the effect that they understood the statements in question to refer to him implicitly because of his official position. *New York Times Co.* v. *Sullivan*, 376 U.S. at 288-291 & n.28.

plaintiff's case-in-chief, a jury question existed concerning the "actual malice" of Time when it published an article about Pape. Again, this Court said that the scope of its review was premised on "the *settled principle* that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'" *Id.* at 284 (emphasis added) (citation omitted). It then reviewed in some detail the basis for the statements the Time article contained and, after that review, concluded that Time's "conduct reflected at most an error of judgment" which was not sufficient to send to a jury the question whether Time had published the article with "actual malice." *Id.* at 292.

In other libel cases, as well, this Court has engaged in the same, intensive, fact-bound review to determine whether clear and convincing evidence of actual malice was demonstrated on the record compiled below. *E.g.*, *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 156-158, 168-169 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83-84 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727, 739-733 (1968); *Greenbelt Cooperative Publishing Association.* v. *Bresler*, 398 U.S. 6, 11 (1970); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54-57 (1971). *See National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 282 (1974).[8]

But the rule requiring independent examination of the entire record to determine whether speech is protected is not a rule unique to libel cases. Indeed that rule, as the cited cases recognize, generally manifests the important obligation this Court has, not only to announce constitutional principles, but to ensure that judgments are rendered in accordance with

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[8] Indeed, those who have, at times, disagreed with adoption of a prophylactic rule which might effectively ease, at least somewhat, the burden undoubtedly imposed on this Court by the requirement for independent review have adverted to the efficacy of that type of review as an argument against the prophylactic rule itself. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 397-398 (1974) (White, J., dissenting).

those principles.[9] Chiefly for two reasons, that obligation often makes broad and independent review of the entire record unavoidable.

Sometimes independent review is required because the constitutional principle involved is itself so fact-sensitive that broad review is necessary for its very application. For that reason, only three months ago, this Court independently reviewed the record in a case which, like this one, came to it after a bench trial in the United States District Court. In *Connick* v. *Myers*, ___ U.S. ___, 51 U.S.L.W. 4436 (U.S., April 20, 1983) (No. 81-1251), the question was whether, and to what extent, the First Amendment limited the right of a public employer to discharge an employee for speech-related activity. Reversing a judgment in favor of the employee, this Court held that the district court erred in concluding that the employee's speech involved "matters of public importance and concern" and that it had imposed on the employer "an unduly onerous burden" to show that the reasons for discharge were unrelated to exercise of protected freedoms. *Id.* at 4437, 4439.

Again, however, this Court did not stop there. Instead, it went on to examine for itself the statements in issue and the circumstances under which they were made to reach the "independent constitutional judgment on the facts of the case" that the employer's discharge of the employee had been proper. *Id.* at 4439 n.10. It did so because the ultimate constitutional judgment turned on a proper resolution of the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 4436, citing *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). *See also Branti* v. *Finkel*, 445 U.S. 507, 518 (1980); *Elrod* v. *Burns*, 427 U.S. 347, 367-368 (1976). Given the nature of the constitutional principle at issue, involving as

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[9] This Court's power, after all, is the power to correct "wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

it did a broad-gauge balance of differing interests, proper application of that principle necessarily required an extensive independent review of, and judgment on, the facts of the entire case.[10]

More commonly, however, independent review is required because the constitutional rule of decision, although couched in terms which, at first blush, appear relatively firm, certain and "factual," is not fully self-defining and thus gains life and meaning only by its application to the facts of specific cases. *See Culombe* v. *Connecticut*, 367 U.S. 568, 604-605, 622 (1961) (opinion of Frankfurter, J.). In both *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), for example, the question was whether conduct the state had punished as a criminal "breach of the peace" nonetheless constituted a "peaceable assembly" fully protected by the First Amendment. To answer that question, this Court reviewed in substantial detail the evidence contained in the record and concluded for itself that petitioners' activity had been the kind of "peaceable assembly" the First Amendment was designed to protect.[11]

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[10] *See also Fiske* v. *Kansas*, 274 U.S. 380 (1927), a due process case, albeit a due process case clearly tinged with First Amendment principles. By its very nature, application of the Due Process Clause often requires a fact-sensitive and thorough review of the evidence in order to determine whether the action of the state in a given case has met constitutional requirements. *See, e.g., Drope* v. *Missouri*, 420 U.S. 162 (1975) (competence to stand trial); *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967) (fairness of "show-up" after arrest); *Henderson* v. *Morgan*, 426 U.S. 637 (1976) (voluntariness of plea); *Haynes* v. *Washington*, 373 U.S. 503, 515-518 (1963) (voluntariness of a confession); *Moore* v. *Michigan*, 355 U.S. 155 (1957) (right to counsel and voluntariness of guilty plea); *Chambers* v. *Florida*, 309 U.S. 227, 228-229 (1940) (voluntariness of confession).

[11] In *Cox*, the relevant evidence itself was not free of substantial ambiguity, *Cox*, 379 U.S. at 543 n.7, and thus this Court was required to analyze the record in exacting detail in order to make its independent constitutional judgment. *Id.* at 545-549 & nn.9-12. *Compare Louisiana* v. *Cox*, 244 La. 1057, 156 So.2d 448 (1963) *with Cox* v. *Louisiana*, 379 U.S. 559, 586-597 (1965) (Clark J., dissenting).

Similarly, in *NAACP* v. *Claiborne Hardware Co.*, ____ U.S. ____, 50 U.S.L.W. 5122 (U.S., July 2, 1982) (No. 81-202), the issue was, in part, whether the damages suffered by the respondent as a result of petitioner's boycott had been "proximately caused" by unlawful activity or whether those damages resulted from activity the First Amendment protected. That issue was one of constitutional magnitude because of this Court's earlier holding, reaffirmed in *Claiborne*, that "the permissible scope of state remedies . . . is strictly confined to the direct consequences of . . . [violent] conduct, and does not include consequences resulting from associated peaceful picketing." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966). Proximate causation, although common grist for finders of fact, is by no means a self-defining concept. Because the existence or non-existence of that causation marked the dividing line between constitutional immunity and substantial tort damages, the obligation to insure constitutional application of constitutional principles thus made an independent judgment on the facts of the case inescapable. *See NAACP* v. *Claiborne Hardware Co.*, 50 U.S.L.W. at 5124 n.10, 5130 n.50.[13]

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[13] Other examples abound. In *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946), the question was whether a newspaper editorial and cartoon constituted a "clear and present danger" to the orderly and fair administration of justice. *See also Eaton* v. *City of Tulsa*, 415 U.S. 697, 698 (1974); *In re Little*, 404 U.S. 553 (1973). In *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), the question was whether the pre-*Miller* standards for determining whether a work was obscene had in fact been met. In *Jenkins* v. *Georgia*, 418 U.S. 153, 160-161 (1974), the question was whether the post-*Miller* standards of "prurient interest" and "patent offensiveness" had been met. In *Hess* v. *Indiana*, 414 U.S. 105 (1973), the question was, in part, whether the words used were "fighting words." In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the question was whether Cantwell's conduct was a "clear and present menace to public peace and order." In *Watts* v. *United States*, 394 U.S. 705 (1969), the question was whether Watts' comments at a public gathering amounted to a "threat" to the life of the President of the United States. And in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969), the question was whether there had been material and substantial interference "with the requirements of appropriate discipline in the operation of school."

The cited cases demonstrate the importance of distinguishing between "issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits." *Watts* v. *Indiana*, 338 U.S. 49, 51 (1949) (opinion of Frankfurter, J.); *accord Drope* v. *Missouri*, 420 U.S. 162, 175 n.10 (1975). Those cases show that the obligation to ensure constitutional application of constitutional principles cannot be avoided by articulating standards which break the ultimate principle down into constituent parts, labeling each of those constituent parts a "fact" and then repressing judicial review of the facts ultimately found so long as the fact-finder appeared to nod at the relevant standards. To do that — to reduce constitutional principles to an amalgam of discrete and all-but-unreviewable facts — would give rise to a clear danger that those principles might be frustrated by "distorted fact-finding." *Haynes* v. *Washington*, 373 U.S. 503, 516 (1963).[13] The power of a reviewing court to conduct an independent review and to reach its own constitutional judgment on the facts of the case thus is itself a substantial part of the process by which the lines separating protected speech from criminal or tortious behavior are staked. *Miller* v. *California*, 413 U.S. 15, 25 (1973). *See Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974); *Kois* v. *Wisconsin*, 408 U.S. 229, 232 (1972).[14]

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[13] That danger is not one which stems solely from fact-finding by juries. *See* Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 529 (1970). As the cases just discussed make clear, independent review has been undertaken when cases came to this court from state and federal bench trials as well as from state and federal trials by jury. *E.g.*, *Connick* v. *Myers*, ___ U.S. ___, 51 U.S.L.W. 4436 (1983); *NAACP* v. *Claiborne Hardware Co.*, ___ U.S. ___, 50 U.S.L.W. 5122 (1982).

[14] "Actual malice" necessarily is a "constitutional fact" no different than those just discussed. *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 220. That standard requires, among other things, knowledge of "falsity." But "falsity" is not a unitary concept. *See, e.g.*, Restatement (Second) of Torts § 581A; *cf. Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Here, difficult questions the court of appeals assumed away, *see* n.4, *supra*, included whether knowledge of imprecision, if imprecision there was,

If independent review of the entire record is often required to ensure that the "constitutional facts," *Kois* v. *Wisconsin*, 408 U.S. at 232, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), on which liability turns do indeed exist, then surely independent review of the *process* by which those facts are found in the trial court is both necessary and proper. As this Court has recognized, that process is an important part of the protective fabric with which First Amendment rights are cloaked. *See Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968); Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 534 (1970). *See generally Freedman* v. *Maryland*, 380 U.S. 51 (1965). Indeed, that process is one of the "sensitive tools" used to separate protected speech from unlawful activity. *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

Proper allocation of the burden of proof is one important ingredient of the protection afforded to First Amendment rights in the fact-finding process. *Speiser* v. *Randall*, 357 U.S. at 525. An equally important component of that protection, however, results from the quantum and quality of proof which must be brought forward by the party on whom the burden reposes. As the court of appeals fully recognized in this case, *see* App. X. 26, the constitutional requirement of proof by clear and convincing evidence, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 (1964), itself "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v.

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amounts to knowledge of "falsity" for purposes of applying the constitutional rule and whether the relevant knowledge must include knowledge of the defamatory innuendo — in this case that the sounds were "bizarre" and "grotesque" (App. X. 101, 105) — lurking in the words actually used. *See* Restatement (Second) of Torts § 580A, comment d. The latter question is particularly important in cases like this where the speaker uses words which expressly contradict the asserted innuendo. *See* App. X. 49 ("With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists."). *See also* App. X. 20 n.8.

Texas, 441 U.S. 418, 423 (1979). *See also In re Winship*, 397 U.S. 358, 363-364 (1970).

But the term "clear and convincing," like the term "clear and present danger" or the term "proximate cause" or the term "patent offensiveness," is not fully self-defining. To be sure, the terms provide a guide to appropriate decision-making and they show the general area of focus for proper fact-finding. *See Addington* v. *Texas*, 441 U.S. at 423-425; *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring). A determination whether the standard has been met in a given case, however, ultimately is a value-laden decision which must be made only after the entire record has been canvassed.

Indeed, there is no other way to do it. Surely, the question whether "clear and convincing" evidence has been presented to the trier of fact is not itself a fact like the amount owed by one private partner in a retail shoe business to another. *Cf. Columbus Board of Education* v. *Penick*, 443 U.S. 449, 491 (1979) (Rehnquist, J., dissenting). How "clear," for example, must "clear" evidence be? How "convincing" must "convincing" evidence be? One cannot reduce the answers to those questions to a formula easily applicable always and ever. But the answers to those questions are enormously important for, in part, those answers mark the dividing line between speech which is protected by the First Amendment and that which is not. If constitutional principles are to be applied in constitutional fashion, then the reviewing court must have the ability to determine for itself whether the fact-finding process has proceeded in appropriate fashion. That, as stated, can only be done by taking an independent look at the entire record.

The issue thus posed by this case — whether Bose satisfied its burden of proving by clear and convincing evidence that CU knew its publication was false at the time that publication was made — is substantially different from the issue posed in the cases cited by Bose and decided by this Court over the past several years. *E.g.*, *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979); *Dayton Board of Education* v. *Brinkman*,

443 U.S. 526 (1979); *Rogers* v. *Lodge*, ___ U.S. ___, 50 U.S.L.W. 5041 (U.S., July 1, 1982) (No. 80-2100); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).[15] In each of those cases, the question decided by the trial court was whether an individual or group did or did not have a certain "intent." The issue before this Court in each of those cases was whether the appellate court could review for itself the record compiled in the trial court and come to its own conclusions on that question notwithstanding the requirements of Fed.R.Civ.P. 52(a). Not at issue in any of those cases were the threshold questions whether the trial court correctly allocated the burden of proof or correctly determined that the quantum and quality of evidence adduced by the party having the burden met the relevant standard.

It is obvious, however, that the question whether the record contains the quantum and quality of evidence necessary to support a conclusion that a person did or did not have a given intent and the question whether that intent in fact existed are two entirely separate questions. *See, e.g., Columbus Board of Education* v. *Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring).[16] Indeed, the difference between the two is what

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[15] This case is distinguishable at once from *Inwood* and *Pullman-Standard* because those cases involved questions of statutory construction alone. Resolution of the issues those cases presented thus did not mean the difference between preservation of a constitutional right and violation of it.

[16] This Court repeatedly has held that a finding is "clearly erroneous" when, "*although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). *Accord Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). As those words make clear, before arriving at a conviction that a mistake has been committed, the reviewing court must conclude as a preliminary matter that there is *some* evidence on the record sufficient to support the court's finding. In the vast majority of cases in which the fact at issue need be proved only by a preponderance of the evidence, this preliminary conclusion understandably is reached with little or no discussion by the re-

gives to the "possibility of mistaken fact-finding . . . inherent in all litigation" which this Court so fully discussed in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). And if both questions were left to the near-final decision of the trial court, appellate review would lose much, if not all, of its role in assuring that First Amendment rights were fully and carefully protected.

Properly viewed, then, this case is not one in which the court of appeals manifested a belief that it was free to make up its own mind about the fact on which liability turned. *Cf. Pullman-Standard* v. *Swint*, 456 U.S. 273, 284-285 (1982).

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viewing court, because evidence of virtually any quality or quantity is capable of being found more persuasive by the fact-finder than evidence of any quality or quantity to the contrary. This characteristic of the preponderance of the evidence standard is true whether the fact at issue is the color of a traffic light or the existence of discriminatory intent under Title VII of the Civil Rights Act. In both cases, therefore, the only difficult question to be resolved by the reviewing court is whether the trial court decided that fact against the clear weight of the evidence — in other words, whether the trial court's finding was clearly erroneous. *See Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

On the other hand, when the fact at issue must be proved by more than a mere preponderance of the evidence — by clear and convincing evidence — the first tier in the two-tiered process of inquiry just described achieves far greater significance. For the appellate court must in the first instance ask itself not merely whether there is *any* evidence on the record which, if believed, could tend to prove the fact at issue, but whether the evidence on the record as a whole is of a quality and quantity which is "clear and convincing." *See Santosky* v. *Kramer*, 455 U.S. 745, 764 (1982); *Addington* v. *Texas*, 441 U.S. 418, 424-425 (1979). As has been emphasized earlier, that is a question which is extremely important yet not easily resolved.

In this case, after a thorough review of the record in light of existing legal standards governing the meaning of "clear and convincing" evidence in the context of First Amendment cases, the court of appeals answered the first question in the negative. Accordingly, it was unnecessary for that court even to reach the question which would have brought into play the clearly erroneous standard of Fed.R.Civ.P. 52(a) — that is, whether, on the entire evidence, it was left with the firm conviction that the district court had been mistaken in concluding that CU published the words "instruments . . . tended to wander about the room" with knowledge that they were false or with reckless disregard of their truth or falsity.

Instead, the court of appeals reviewed the entire record to determine whether the existence of that fact was shown on the record by the quantum and quality of evidence the Constitution commands. Because the answer to that question determined whether CU's speech was or was not protected by the First Amendment to the Constitution, the case was a "proper" one for review of "the evidence to make certain that [the constitutional principles embodied in the "clear and convincing" rule] ha[d] been constitutionally applied." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). In conducting that review and answering that question, the court of appeals thus was not bound by Fed.R.Civ.P.52(a). As will be demonstrated shortly, the constitutional judgment reached by the court of appeals after its review was surely correct.

B. *Even if the Rule Requiring Proof by "Clear and Convincing" Evidence is Not of Constitutional Dimension, the Court of Appeals Properly Exercised Its Independent Judgment to Determine Whether that Standard Had Been Met.*

As mentioned, earlier, the question considered by the court of appeals was whether the evidence produced by Bose satisfied the "clear and convincing" standard required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 (1964), in cases like this. Even if the "clear and convincing" rule does not derive from the Constitution itself, that question historically and properly has been viewed by this Court as one which did not bind a reviewing court to the confines of Fed.R.Civ.P.52(a).

At bottom, the requirement that knowledge of falsity be shown on the record by "clear and convincing" evidence represents a choice concerning who bears the risk of erroneous fact-finding. The common "preponderance of the evidence" standard "allows both parties to 'share the risk of error in roughly equal fashion.' . . . Any other standard expresses a

preference for one side's interests." *Herman & MacLean* v. *Huddleston*, ___ U.S. ___, 51 U.S.L.W. 4099, 4103 (U.S., January 24, 1983) (Nos. 81-680, 81-1076). *See also Santosky* v. *Kramer*, 455 U.S. 745, 755 (1982); *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). But that preference is not a preference abstractly made. Instead, it represents a determination that the "social disutility" of an erroneous judgment penalizing speech is much greater than the "social disutility" of a wrong judgment in the speaker's favor. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); Schauer, *Fear, Risk and The First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685, 702-703, 708-709 (1978).[17]

Denaturalization and deportation cases illustrate the point. In *Schneiderman* v. *United States*, 320 U.S. 118 (1943), this Court held that the government must prove its case with "clear, unequivocal and convincing" evidence, for "[w]ere the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and stresses of the times." *Id.* at 159. *Accord Fedorenko* v. *United States*, 449 U.S. 490 (1981); *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276

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[17] The infrequency with which this Court has imposed the requirement of proof by "clear and convincing" evidence attests to the value of the interests it is designed to protect. In addition to the libel cases, the "clear and convincing" requirement appears to have a current life as an evidentiary rule in five other areas: revocation of parental rights, *Santosky* v. *Kramer*, 455 U.S. 745 (1982); denaturalization proceedings, *Fedorenko* v. *United States*, 449 U.S. 490 (1981); civil commitment proceedings, *Addington* v. *Texas*, 441 U.S. 418 (1979); the existence of an independent basis for an in-court identification after an identification at a tainted lineup, *United States* v. *Wade*, 388 U.S. 218 (1967); and certain disputes between states tendered to this Court for resolution under its original jurisdiction, *Colorado* v. *New Mexico*, ___ U.S. ___, 51 U.S.L.W. 4045, 4048 & n.13 (U.S., December 13, 1982) (No. 80, Orig.). In a non-evidentiary sense, the requirement has been applied to showings that the legislature intended to preclude all judicial review of an administrative action. *FTC* v. *Standard Oil Company*, 449 U.S. 232, 249 n.5 (1980) (Stevens, J. concurring).

(1966); *Costello* v. *United States*, 365 U.S. 265 (1961); *Chaunt* v. *United States*, 364 U.S. 350 (1960); *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958); *Baumgartner* v. *United States*, 322 U.S. 665 (1944).

After announcing that standard, the Court reviewed for itself the evidence in the record and concluded that the standard had not been met. *Schneiderman* v. *United States*, 320 U.S. at 125, 144 (1943). Explaining its analysis of one aspect of the record which the Government urged was sufficient to support the judgment rendered by the court below, this Court said as follows:

> We do not say that a reasonable man could not possibly have found, as the district court did, that the Communist Party in 1927 actively urged the overthrow of the Government by force and violence. But that is not the issue here. We are not concerned with the question whether a reasonable man might so conclude, nor with the narrow issue whether administrative findings to that effect are so lacking in evidentiary support as to amount to a denial of due process. As pointed out before, this is a denaturalization proceeding in which, if the Government is entitled to attack a finding of attachment . . . the burden rests upon it to prove the alleged lack of attachment by "clear, unequivocal and convincing" evidence. That burden has not been carried. The government has not proved that petitioner's beliefs on the subject of force and violence were such that he was not attached to the Constitution in 1927.

Id. at 153-154.

The following term, in *Baumgartner* v. *United States*, 322 U.S. 665 (1944), this Court announced the principled basis for its conclusion that an appellate court's own view of the record determined whether "clear, unequivocal and convincing" evidence was present. This Court said:

> It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. . . . But we must be . . . watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We have sufficiently indicated the considerations of policy, derived from the traditions of our people, that require solid proof that citizenship was falsely and fraudulently procured. These considerations must guide our judicial judgment. Nor can the duty of exercising a judgment be evaded by the illusory definiteness of any formula.

Id. at 676.

While suggesting that the question whether the rigorous standard of proof had been met was an "ultimate" fact which an appellate court was not bound to review in the manner it was compelled to review "subsidiary" facts, this Court admitted that the difference between an "ultimate fact" and a "question of law," if any, was not always easy to determine. Concluding its discussion of the matter, the court said as follows:

> Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof . . . on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts," not open to review here.

Id. at 671. That approach was reaffirmed most recently in *Fedorenko* v. *United States*, 449 U.S. 490 (1981).[18]

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[18] As this Court itself observed in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), the label "ultimate finding" is not a particularly helpful analytical

The "clear, unequivocal, and convincing" standard applied in the denaturalization cases did not stem from the Constitution itself. *Vance* v. *Terrazas*, 444 U.S. 252 (1980). *See Herman & MacLean* v. *Huddleston*, ____ U.S. ____, 51 U.S.L.W. 4099, 4103 (U.S., January 24, 1983) (No. 81-680); *Steadman* v. *SEC*, 450 U.S. 91, 102 n.22 (1981). Nonetheless, the values protected by that standard involved "judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944). As a result, however labeled, the "clear, unequivocal and convincing" rule is not a fact like the color of the traffic light at the time of the accident but "clearly implies the application of standards of law." *Baumgartner* v. *United States*, 322 U.S. at 651. *Accord Pullman-Standard* v. *Swint*, 456 U.S. at 288. Moreover, the phrase "clear and convincing" implies a "qualitative as well as a quantitative judgment." *See Santosky* v. *Kramer*, 455 U.S. 745, 764 (1982); *Addington* v. *Texas*, 441 U.S. 418, 424-425 (1979). *Cf. In re Winship*, 397 U.S. 358, 364 (1970); *Steadman* v. *SEC*, 450 U.S. 91, 98, 102 n.22 (1981). And that qualitative judgment, at least, cannot be reduced to "the illusory definiteness of a formula." *Baumgartner* v. *United States*, 322 U.S. at 676.

If the qualitative judgment embodied in the "clear and convincing" rule inherently escapes the "illusory definiteness" of reformulation, if its function as a bulwark against erosion of important rights would be seriously undercut by treating it as a "fact" like all others not open to review and if it is a finding which has no life independent of a legal standard, then surely independent review of the type undertaken by the court of

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tool. The real question in each case is whether the finding of the district court under review has a life independent of a legal standard or concept or whether that legal standard or concept is an indispensable element of the finding in question. *See generally Pullman-Standard* v. *Swint*, 456 U.S. at 286-287 n.19 (1982); *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *cf. Fiske* v. *Kansas*, 274 U.S. 380, 385-386 (1927).

appeals here was proper. Indeed, only through such independent review is it possible to insure that the qualitative judgment the rule embodies does in fact protect the rights it is designed to serve.

III. The Court of Appeals Correctly Concluded that Bose Had Not Proved C[illegible]s Actual Malice by Clear and Convincing Evidence.

In carrying out its review of the record, the court of appeals summarized the evidence — all virtually uncontested — it considered in reaching the conclusion that petitioner had failed to meet its burden of proof. First, the court reviewed the evidence as to the state of mind of Seligson, one of the two engineers who conducted the relevant listening tests and upon whose written description of those tests the article was based. Even giving due regard to the district court's disbelief of Seligson's testimony that the words used in the article accurately described what he heard, the court of appeals properly concluded that "[t]he evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. . . . Certainly this does not support an inference of actual malice." (App. X. 35.)

That conclusion is amply supported by cases this Court has decided. The district court's finding with respect to Seligson's "actual malice" was based on its finding that the word "about" was false coupled with (a) its disbelief of Seligson's testimony that he thought the word, in context, accurately described what he heard, and (b) its conclusion that he was too intelligent a person to equate the words "about" and "across" (App. X. 141-142). To the extent that the district court concluded that Bose's burden was satisfied by its disbelief of Seligson's testimony, the district court was wrong. As this Court held in *Nishikawa* v. *Dulles*, 356 U.S. 129, 137 (1958), clear and convincing evidence of a fact is not supplied by disbelief of testi-

mony concerning the non-existence of that fact.[19] To the extent that the district court relied on its conclusion as to the "plain, ordinary meaning" of the word "about" and on Seligson's being too intelligent to mistake that meaning, the court was using an objective test of Seligson's state of mind which is wholly incompatible with the "actual malice" standard applicable to this case as a whole. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Garrison* v. *Louisiana*, 379 U.S. 64, 78-79 (1964).

The court of appeals also reviewed the evidence regarding the editorial procedures followed by CU in the course of preparing the article for publication. Despite the trial court's suggestion at trial that such evidence was irrelevant (J.A. 130-131), a brief look at that evidence reveals that it, too, was appropriately reviewed by the court of appeals to determine whether the burden of proving actual malice had been met. Seligson's written report of the phenomena he observed during the listening tests, the "report to editorial," was sent to CU's Editorial Department to assist it in preparing the article for publication (J.A. 125-126). Although the Editorial Department sent the manuscript to Seligson for his review, Seligson did not have final authority to approve its content prior to publication (J.A. 145-146). As the court of appeals recognized, during the course of this editorial process, "the [Editorial] Department changed Seligson's words that instru-

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[19] Disbelief of testimony concerning the existence of a fact is not affirmative evidence of the non-existence of that fact in any context. As the United States Court of Appeals for the First Circuit consistently has said, "however satisfied a court may be from the witness's demeanor or his demonstrated untruthfulness in other respects that certain testimony is false, it cannot use such disbelief alone to support a finding that the opposite was the fact." *Janigan* v. *Taylor*, 344 F.2d 781, 784 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). *See generally Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 576-577 (1951); *Beaumont* v. *Morgan*, 427 F.2d 667, 672-673 (1st Cir. 1970); *NLRB* v. *Gotham Industries, Inc.*, 406 F.2d 1308, 1310 (1st Cir. 1969); *Federal Insurance Co.* v. *Summers*, 403 F.2d 971, 974 (1st Cir. 1968); *NLRB* v. *Joseph Antell, Inc.*, 388 F.2d 880, 883 (1st Cir. 1968).

ments 'suffered [from] a tendency to wander around the room' to the statement ultimately published that instruments 'tended to wander about the room.'" (App. X. 33.) *See* J.A. 160-161. The manuscript prepared by CU's Editorial Department also was reviewed by Monte Florman, then CU's Associate Technical Director and one of Seligson's superiors (J.A. 130). Florman testified that, when conducting his review of the manuscript, he "never really pondered" the meaning of the word "about" as used in the relevant phrase (J.A. 219). *See* App. X. 34.[20]

The most that can be concluded from this evidence, said the court of appeals, "is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise language being used." (App. X. 34.) That conclusion, against the backdrop of this record, was surely proper. Indeed, it is quite similar to the conclusion reached by this Court itself in *Time, Inc.* v. *Pape*, 401 U.S. 279, 292 (1971), where, as here, the source materials on which the relevant article was based themselves were not free from ambiguity.[21]

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[20] In its brief and in its statement of the questions presented, Bose argues that it was improper for the court of appeals to consider Florman's testimony regarding his role in the editorial process because "[t]he District Court judge had found expressly that 'Florman's testimony is wholly untrustworthy and is not credible' (App. X163)." (Brief for Petitioner, pp. ii, 69.) This quote from the district court's opinion is taken out of its limited context and altogether misstates the district court's finding as to Florman's credibility. Florman testified on a number of subjects at trial, among them his observations during a listening test he conducted on the Bose 901's *after* Bose had complained to respondent about the article (J.A. 203-206). It was only Florman's testimony that he had heard "unusual auditory effects" during this post-publication listening test that the district court disregarded as not credible (App. X. 163). Florman also testified at some length as to the editorial procedures followed by respondent in preparing the article for publication. *See* J.A. 197-200, 214-219. Far from disregarding it, the district court explicitly accepted Florman's testimony as to the meaning of the word "about" in the context of the statement concerning wandering instruments (App. X. 103), and, indeed, directly quoted from Florman's description of the editorial process in its opinion (App. X. 167-168).

[21] Bose suggests that other evidence, neither relied on by the district court nor raised by Bose in the court of appeals, supports the finding that it

In sum, the court of appeals correctly concluded that neither the evidence as to the state of mind of Seligson, nor the evidence as to the editorial procedures followed by CU nor any other evidence on the record, taken by itself or cumulatively, was sufficient to prove with "convincing clarity" that the words at issue were published with "actual malice." A contrary conclusion would mean that the burden of proving knowledge of falsity by "clear and convincing evidence" could be shouldered by proof of little more than falsity alone. *But see* n.4, *supra*. That, of course, is the very result the "clear and convincing" standard was designed to prevent.

Conclusion.

Although this case involves on its face a question of procedure, the answer to that question is enormously important. As Justice Frankfurter put it forty years ago, the "history of

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established actual malice with clear and convincing proof (Brief for Petitioner, pp. 54-60). It does not. First, the fact that the listening panel used for conducting the special test on the Bose 901's was different from the panel used in conducting the separate "cricket test" described in the article simply is irrelevant to the question whether CU knew or acted with reckless disregard of whether the words "instruments . . . tended to wander about the room" accurately described what the panelists who, in fact, tested the Bose 901's heard. Second, the claim that Bose failed to play the recordings used during the special listening test through a conventional loudspeaker as well as through the Bose 901's would also be irrelevant to the actual malice issue if it were true. In fact, CU did employ a reference loudspeaker during the special listening test to "see what ordinary loudspeakers . . . would sound like under the same circumstances" (J.A. 101-103). Third, Bose's claim that actual malice can be inferred from CU's use of the word "instruments" in describing the wandering effect since Seligson and Lefkow testified that only the violin "wandered", is without merit. The district court ruled that CU "reported accurately that instruments . . . tended to wander. . . ." (App. X. 102.) Finally, the fact that CU did not identify the records it used in the listening tests when asked to do so by Bose *after* the article had been published is of no relevance whatsoever to CU's state of mind at the time the article was published. *See St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943). The power and duty of a reviewing court to reach in a proper case its own judgment concerning whether constitutional principles have been constitutionally applied is an important ingredient of the strategic protection afforded to rights preserved by the First Amendment. It is an important ingredient precisely because it constitutes the only sound means by which often ambiguous rules of decision possibly can take on meaningful form.

In this case, the court of appeals utilized the scope of review historically reserved to an appellate court when constitutional judgments must be made and properly concluded that Bose had not satisfied its burden of producing "clear and convincing evidence" of CU's "actual malice." In so doing, the court of appeals did not invade the territory reserved to the trier of fact by Rule 52(a). As a result, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S OBJECTION STATING REASONS FOR WITHHOLDING CONSENT TO THE FILING OF BRIEFS AMICUS CURIAE

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CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

PETITIONER'S OBJECTION STATING REASONS FOR WITHHOLDING CONSENT TO THE FILING OF BRIEFS AMICUS CURIAE

Petitioner has withheld consent to the request of James F. McHugh, Esq., to the filing of a brief amicus curiae, purportedly on behalf of members of the American Civil Liberties Union and Civil Liberties Union of Massachusetts because

the requirements of Rule 36.3 for filing such a brief could not be met. Floyd Abrams, Esq., never properly sought petitioner's consent to the filing of a brief amicus curiae, purportedly on behalf of 13 organizations, nor made any attempt to show he could meet the requirements of Rule 36.3.

Rule 36.3 of this Court reads as follows:

> .3. When the consent to the filing of a brief of an amicus curiae in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file, accompanied by the proposed brief, complying with the 30-page limit, may be presented to the Court. No such motion shall be received unless submitted within the time allowed for the filing of an amicus brief on written consent. The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the

> disposition of the case; and it shall in no event exceed five pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

Neither the letter sent to us by Attorney McHugh requesting consent[1], nor either motion, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be,

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[1]Mr. Abrams did not send us a letter requesting consent. On June 30, 1983, a telephone caller identifying himself as Ken Meister of Cahill, Gordon and Reindel, who could not identify all the parties for whom consent was sought, promised to send us a letter requesting consent, identifying all the parties and stating the reasons why filing a brief amicus curiae was proper. We never received any letter from any lawyer in Cahill, Gordon & Reindel and did not receive the Abrams motion until July 18, 1983. The telephone caller told us that these motions [for leave to file brief amicus curiae] were "automatically granted" by the Court, and he was requesting petitioner's consent to filing only as a "courtesy." The statement in the Abrams motion, p. II, that "consent of the petitioner, Bose Corporation, has been requested and refused," is at best misleading.

presented by the parties. While the McHugh motion states that the American Civil Liberties Union has over 250,000 members and the Civil Liberties Union of Massachusetts has approximately 9,500 members, it does not and cannot allege that the views in the amicus curiae brief represent the common interest of all, or even most of these members, as distinguished from the interest of those members who oppose petitioner's views. Since Rule 36.3 conditions the issuance of an order permitting a nongovernmental interest to file an amicus curiae brief upon showing both an interest and the inadequacy of presentation of relevant law and fact issues by the parties, we submit there are no grounds for granting either motion.

There is no excuse for this failure to comply with Rule 36.3 because we

expressly stated to Attorney McHugh in our letter of July 6, that we would withhold consent until he made a proper showing under Rule 36.3. And surely Attorney Abrams, the first listed partner in a firm of 49 partners, IV MARTINDALE-HUBBELL LAW DIRECTORY 1214B (1983), must have known of the requirements of Rule 36.3. In this letter to Attorney McHugh we stated that we had no opposition to his assisting respondent in the preparation of its brief.

In his letter of June 30, 1960, requesting our consent, Attorney McHugh advanced as the sole basis for filing:

> ACLU and CLUM desire to file the brief just described because they believe that the issues raised by this case are profoundly important, reach far beyond the confines of a dispute, however important, between two private litigants and reach far beyond questions of proper interpretation of the Federal Rules of Civil

Procedure. Moreover, my clients believe that the question whether, and to what extent, a reviewing court can make for itself an independent constitutional judgment on the facts of the case which involves rights protected by the First Amendment is a question which affects all cases involving rights that Amendment protects and is not a question which solely affects the proper scope of review in libel cases.

My clients also believe that the United States Court of Appeals for the First Circuit correctly applied the proper standard of review and reached the correct result in this case after doing so. A contrary result, in their judgment, would have a chilling effect on free and open discussion of a wide range of matters of public concern.[2]

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[2]Neither the McHugh nor the Abrams motions made any attempt to comply with Rule 36.3. The McHugh motion concluded:

> In sum, *amici* believe that resolution of the "procedural" issues riding on the surface of this case can have very important consequences for the substantive First Amendment rights those procedural issues concern. To present the foregoing views in this important First Amendment case, ACLU and CLUM respectfully move for leave to file the attached brief as *amici curiae*.

We immediately recognized that the stated reasoning was insufficient under Rule 36.3. In addition we doubted that

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Second and third unnumbered pages.

The Abrams motion advanced as the sole basis for filing:

> The movants seek to submit a brief *amici curiae* with this Court because they share a common interest in preserving and exercising first Amendment rights held protected by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and a common concern that reversal by this Court of the judgment of the Court of Appeals would imperil those rights. The *amici* believe that those rights would be threatened by a rule of law that would subject those who describe, review, rate, evaluate and criticize the products, services, performance and activities of others to standards of verbal accuracy that are as impossible to articulate as they are to meet. In addition, in light of the nature of the constitutional issues at stake, the complexity of the subjective judgments involved in these cases-including questions of subjective intent-and the exacting standard of proof to be met, independent appellate review of the evidentiary record is, the movants believe, essential to protect both the

Attorney McHugh would represent the interest of the members of ACLU and MCLU.

In his letter of June 30, 1983, requesting consent and refusing to send us a copy of his proposed brief for review, Attorney McHugh said, "As I explained to you, I am not comfortable with the idea of sending to you a document which still is in an evolutionary stage. In the event that it is possible to send to you the completed document before the filing deadline, I shall do so."

When we telephoned Attorney McHugh on July 6, 1983, we were informed that he was on vacation and would not return for two weeks. His associate, Attorney Serene, returned our call and told us that the

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constitutional interests at stake and the integrity of the process of constitutional adjudication. P. II.

brief had been completed and was at the printers. A brief at the printers is hardly "a document which still is in the evolutionary stage." Attorney Serene declined to furnish us with a copy of the proposed brief.

We requested Attorney Serene to supply us with a copy of the bylaws and constitutions of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts and the minutes or any other records relating to the decision to file a brief in support of respondent. We told Attorney Serene that we doubted it was in the interest of members of these organizations to oppose the position of petitioner because the "clearly erroneous" standard of review, which petitioner supports, is a two-edged sword, and rejecting this rule might well result in results

opposed to the interest of the members of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts. See *Rogers v. Lodge*, __ U.S. __, 73 L.Ed. 2d 1012, 1021 (1982) and Annot., 72 L.Ed. 2d 890 (1983).

That recent annotation includes the following comment:

> COMMENT: Noting that the scope of appellate fact review continues to widen, one Federal District Court judge has observed that an important factor underlying the expansion of appellate court power is the avoidance of FRCP 52(a) or the circumvention of it by ever-changing interpretations. The judge points out that the appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the clearly erroneous rule. The commentator notes that although purporting to pay homage to the clearly erroneous rule, appellate courts have become less reticent to substitute their view of the evidence for that of the trial court to "do justice." Nagle, The Ever Widening Scope of Fact Review in Federal Appellate Courts - Is the

"Clearly Erroneous Rule" Being Avoided? 59 Wash U LQ 409 (1981). *Id.* 894.

If petitioner consented to the filing of a brief opposing its position, purportedly representing the interest of all ACLU and CLUM members, petitioner would in effect be lending support to views against not only its interest, but also against what petitioner believes to be the interest of the people of the United States. Moreover, we would be misleading this Court into believing that the views in the amicus curiae brief represent the interest of the overwhelming majority of ACLU and CLUM members when we submit that many, if not all, members agree with petitioner's views.

The refusal to supply us with any records relating to the decision to file a brief in support of respondent reinforces

our doubts that the McHugh brief truly represents the interest of ACLU and CLUM members genuinely interested in traditional concepts of fair play and substantial justice through following procedural due process required by the Fifth Amendment and embodied in the "clearly erroneous" standard of Rule 52(a), as distinguished from the interest of those attorneys advocating a constitutional right to lie under the First Amendment. Attorney McHugh and his firm represent the Boston Globe. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583(1st Cir. 1980).

On April 15, 1983, Ira Glasser, Executive Director of the American Civil Liberties Union since October of 1978 testified as follows:

Q. Is there any connection with

the American Civil Liberties Union and the Consumers Union?

A. No.

Q. There is none whatsoever?

A. No.

Q. Is there an endowed fellowship of the union called the Karpatkin Fellowship.

A. Yes.

Q. Who is the Karpatkin who is referred to in that title?

A. Marvin Karpatkin. It is not endowed, however,

Q. May I ask why it is called the Karpatkin fellowship?

A. Yes, it is in memory of Marvin Karpatkin, who was formally [sic] General Counsel and Member of the Board.

MR. POLLET: You have in the past gone on at length about the activities of Mr. Karpatkin.

I would like to say on the record that I find your behavior here as scandelous [sic], loathsome, and beyond contempt.

> Q. My next question to you is are you aware of the fact that Mrs. Rhoda Karpatkin is the Executive Director of the Consumers Union?
>
> A. Yes. Deposition of a Non-Party Witness, American Civil Liberties Union, by Ira Glasser, taken by plaintiff pursuant to subpoena, pp. 8-9, April 15, 1983). *Cranberg v. Consumers Union of U. S., Inc.* (W.D. Tex., Austin Div. Cause No. A-81-CA-496).

Both Mr. and Mrs. Karpatkin were members of the law firm representing respondent. See *Rose Corp. v. Consumers Union of United States, Inc.*, 181 U.S.P.Q. (BNA) 543 (D. Mass. 1974). Rhoda H. Karpatkin, Esq., respondent's executive director, IV MARTINDALE-HUBBELL LAW DIRECTORY 510 (1983), has been a member of the Academic Freedom Committee of the American Civil Liberties Union since 1973. 1 WHO'S WHO IN AMERICA 1747 (1982-83 ed.). We submit that the McHugh brief is to advance the private interest of Attorney Karpatkin as

executive director of respondent in covering up the willful misrepresentation of test results by its engineers published in respondent's magazine as distinguished from the interest of ACLU and CLUM members in promoting civil liberties.

We don't see how "resolution of the 'procedural' issues riding on the surface of this case . . . [having] very important consequences for the substantive First Amendment rights those procedural issues concern," McHugh Motion, second unnumbered page, or "a common concern [by the 13 amici represented by Attorney Abrams] that reversal by this Court of the judgment of the Court of Appeals would imperil . . . [First Amendment] rights," Abrams Motion p. II, can bear on whether the parties will adequately present questions of law or fact relevant to the disposition of

this case. The question for consideration under Rule 36.3 is whether these issues will be adequately presented by the parties, not whether the lawyer leaders of what are represented as a "non-partisan organization" and joined-together media organizations should be able to influence the outcome of the litigation by echoing the views of one of the parties. And when the attorneys of record file motions without regard to Rule 36.3 and act so as to place a serious question as to whether they obscure rather than expound the views of the members, petitioner doubts that a brief endorsed by these attorneys can be relied upon by the Court as an aid to resolving the important constitutional, procedural and equitable issues presented for decision in this case.

Regardless of how other lawyers feel about the substantive issues in this case, we submit that the overwhelming majority of lawyers would agree that it is at best unwise, and probably improper, for attorneys for a "non-partisan organization" or a partisan organization to use that organization in support of views of one group of its members and oppose the views of a different group of its members by supporting one private litigant and opposing another. By approving the filing of a brief supporting respondent, the leaders have authorized using the dues of its members to oppose a position consistent with traditional concepts of fair play and substantial justice urged by petitioner that when followed advance civil liberties and responsible journalism.

On August 1, 1983, amendments to the

Federal Rules of Civil Procedure take effect pursuant to the order of this Court dated April 28, 1983. These rules include provisions placing greater responsibility upon attorneys. For example, FED. R. CIV. P. 11 headed "Signings of pleadings, motions, and other papers; sanctions" now provides, "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

litigation." While this Court has no such rule, the deliberate violation of Rule 36.3 evident in the McHugh and Abrams motions is reason enough for denying these motions.

Attorney Abrams did not even properly seek petitioner's consent. "Counsel for an *amicus curiae* should address a letter to the attorney for each party, requesting consent to the filing of an *amicus* brief and stating whatever reasons may be deemed appropriate." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 723 n.33 (5th ed. 1978). When the only effort to seek consent was by a telephone caller who could not even identify all the amici[3]

[3]The Abrams motion fails to set forth compliance with bylaws of the five associations, societies and committees he purportedly represents authorizing him to represent the interest of all members. We submit that many, if not all, of these members support the rules of fair procedure required by the Fifth Amendment

purportedly represented by Attorney Abrams and promised to send a letter properly requesting consent with "whatever reasons may be deemed appropriate," but sent no letter, and petitioner agreed to consider the request after reviewing the letter, it is at best misleading to represent to this Court that "consent . . . has been requested and refused." Abrams Motion p. II.

The callous disregard for compliance with Rule 36.3 conveyed by this telephone caller in saying that these motions are "automatically granted," and he was requesting consent to filing from petitioner solely "as a matter of courtesy," cannot be condoned. If EQUAL JUSTICE UNDER LAW emblazoned above the portals of this Court means

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and FED. R. CIV. P. 52(a) urged by petitioner.

anything, it is that lawyers from the large metropolitan law firms, like sole practitioners, are not excused from compliance with the rules of this Court. And when they file motions in defiance of Rule 36.3, equal justice requires denial of their motions.

> The Department of Justice frowns upon the filing by amici with merely an academic interest at one extreme, or those who merely wish to engage in propaganda on the other. Consent is given 'where the applicant has a concrete, substantial interest in the decision of the case, and the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted." *Id.* 728 n.36.

Neither the McHugh nor the Abrams motions make such a showing, nor did Attorneys McHugh or Abrams make any effort to make such a showing to petitioner before filing their

motions.

We recognize our responsibility to not withhold consent unreasonably, *On Lee v. United States*, 343 U.S. 924 (1952). But where, as here, the attorneys seeking consent deliberately refuse to make available to us information necessary to determine whether "the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted," R. STERN & E. GRESSMAN, *supra* 728 n.36, our responsibility to the Court requires withholding consent.

We submit that the McHugh and Abrams motions were submitted for the improper purpose of taking unfair advantage of the accepted practice "(dictated largely by the exigencies of time) . . . to append the proposed *amicus* brief to the motion

for leave to file such brief, binding them in a single cover, a denial of the motion is not too disastrous; in passing upon the motion, the Justices or their clerks will see and may well read the brief to the same extent that they would if the motion were granted." *Id.* 496-97.

In guiding lawyers more than two decades ago a distinguished practitioner before this Court said:

> No doubt the soundest view is that the filing of a brief *amicus curiae* on behalf of a client should be seriously considered only when such filing is plainly necessary to protect that client's interest, but not when the only justification for such a course would be the desire to add a "me too," or even a conviction that "anything-you-can-say-I-can-say-better."
>
> A good yardstick for differentiating between the two situations is the Supreme Court rule that sets forth the showing required to be made in a motion for leave to file a

> brief amicus curiae, namely, "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."
>
> . . . [A] brief *amicus curiae* should be filed on behalf of one not a party to the litigation only when it can reasonably be demonstrated that the governing considerations have not been, or will not be, adequately presented by the litigants. If no such demonstration can fairly be made, counsel is better advised simply to pass on to the lawyers actually in the case his pet citations bearing on the issues involved. F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 271-72 (BNA Inc. Washington 1961).

We submit that the remarks of Mr. Justice Frankfurter at the proceedings in his honor on April 30, 1960, in Cambridge concerning "the responsibility of the Bar, as inadequate advisors of amenable clients, for many . . . evils" are appropriate here. He said:

> Again and again I say to myself, and sometimes to a hospitable ear either to the left or right of me,

"why didn't this lawyer, in advising his client, consider beyond construction whether it is right or wise?"

Respectfully submitted,

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ON FILED
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No. 82-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSE CORPORATION,

Petitioner,

—against—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE NEW YORK TIMES COMPANY, CBS, INC., DOW JONES & COMPANY, INC., THE DUN & BRADSTREET CORPORATION, GANNETT CO., INC., NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE READER'S DIGEST ASSOCIATION, INC., THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE MAGAZINE PUBLISHERS ASSOCIATION and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *AMICI CURIAE*

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July 13, 1983

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The movants are publishers, broadcasters and associations of newspaper publishers and editors, of book and magazine publishers and of journalists who join together to move this Court for leave to file a brief as *amici curiae* in this case. The

written consent of the respondent, Consumers Union, has been obtained and has been filed with the clerk of this Court. The consent of the petitioner, Bose Corporation, has been requested and refused.

The movants seek to submit a brief *amici curiae* with this Court because they share a common interest in preserving and exercising First Amendment rights held protected by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and a common concern that reversal by this Court of the judgment of the Court of Appeals would imperil those rights. The *amici* believe that those rights would be threatened by a rule of law that would subject those who describe, review, rate, evaluate and criticize the products, services, performance and activities of others to standards of verbal accuracy that are as impossible to articulate as they are to meet. In addition, in light of the nature of the constitutional issues at stake, the complexity of the subjective judgments involved in these cases—including questions of subjective intent—and the exacting standard of proof to be met, independent appellate review of the evidentiary record is, the movants believe, essential to protect both the constitutional interests at stake and the integrity of the process of constitutional adjudication.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying brief *amici curiae* to present their views to this Court urging affirmance of the opinion of the Court below.

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Interest of *Amici Curiae* 2

Preliminary Statement 4

SUMMARY OF ARGUMENT 9

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONDUCTED AN INDEPENDENT REVIEW OF THE EVIDENTIARY BASIS FOR THE DISTRICT COURT'S CONCLUSION THAT THE STATEMENT CHALLENGED WAS PUBLISHED WITH ACTUAL MALICE 10

A. The Requirement Of Independent Appellate Review 10

B. The Purpose And Scope Of Independent Appellate Review 15

C. The Applicability Of Rule 52(a) Of The Federal Rules Of Civil Procedure 18

CONCLUSION 21

Table of Authorities

Cases: PAGE

Addington v. *Texas*, 441 U.S. 418 (1979) 11n

Baghdasarian v. *United States*, 220 F.2d 677 (1st Cir. 1955) 14n

Baumgartner v. *United States*, 322 U.S. 665 (1944) 12-14, 16, 20

Bechtel v. *United States*, 176 F.2d 741 (9th Cir. 1949) .. 14n

Beckley Newspapers Corp. v. *Hanks*, 389 U.S. 81 (1967) (*per curiam*) 12, 16

Brenci v. *United States*, 175 F.2d 90 (1st Cir. 1949) 14n

Chaunt v. *United States*, 270 F.2d 179 (9th Cir. 1959), *rev'd on other grounds*, 364 U.S. 350 (1960) 14n

Cherry v. *Des Moines Leader*, 86 N.W. 323 (Iowa Sup. Ct. 1901) 8n

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967).... 6

Fix v. *United States*, 176 F.2d 746 (9th Cir. 1949)..... 14n

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 10, 16

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)....7, 10, 11

Gonzalez-Jasso v. *Rogers*, 264 F.2d 584 (D.C. Cir. 1959) 14n

Greenbelt Cooperative Publishing Ass'n v. *Bresler*, 398 U.S. 6 (1970) 6, 12

Herbert v. *Lando*, 441 U.S. 153 (1979)..... 10

Inwood Laboratories, Inc. v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982) 18, 20

Jacobellis v. *Ohio*, 378 U.S. 184 (1963) 15

Lehmann v. *Acheson*, 206 F.2d 592 (3d Cir. 1953) 14n

Lim v. *Mitchell*, 431 F.2d 197 (9th Cir. 1970) 14n

PAGE

Mashburn v. *Collin*, 355 So. 2d 879 (La. Sup. Ct. 1977) 8n

Monaco v. *Dulles*, 210 F.2d 760 (2d Cir. 1954) 14n

New York Times v. *Sullivan*, 376 U.S. 254 (1964) .....*passim*

Niemotko v. *Maryland*, 340 U.S. 268 (1951) 12, 15

Norio Kiyama v. *Rusk*, 291 F.2d 10 (9th Cir.), *cert. denied*, 368 U.S. 866 (1961) 14n

Pennekamp v. *Florida*, 328 U.S. 331 (1946)..... 14

Pullman-Standard v. *Swint*, 456 U.S. 273 (1982).....18, 20

Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971).. 10, 11, 12

Safe Site, Inc. v. *National Rifle Ass'n of America*, 253 F. Supp. 418 (D.D.C. 1966) 8n

St. Amant v. *Thompson*, 390 U.S. 727 (1968) ...6, 10, 12, 16

Schaefer v. *United States*, 251 U.S. 466 (1920) 14n

Stuart v. *Gambling Times, Inc.*, 534 F. Supp. 170 (D.N.J. 1982) 8n

Time, Inc. v. *Pape*, 401 U.S. 279 (1971)..... 12

United States v. *Anastasio*, 226 F.2d 912 (3d Cir. 1955) 14n

United States v. *Montalbano*, 236 F.2d 757 (3d Cir.), *cert. denied*, 352 U.S. 952 (1956)..... 14n

United States v. *Oddo*, 314 F.2d 115 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963) 14n

United States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963)..... 20

Watts v. *Indiana*, 338 U.S. 49 (1949)..... 20n

PAGE

Other Authorities:

Gartner, *Fair Comment*, 33 American Heritage 28 (Oct./Nov. 1982) 8n

Federal Rule of Civil Procedure 52(a) 6, 10, 15, 18-21

LDRC Study, "Independent Appellate Review in Libel Actions Since *New York Times Co.* v. *Sullivan*," to be published in LDRC Bulletin No. 7 (July 15, 1983) ... 17n

Restatement (Second) of the Law of Torts § 580A comment f (1977) 11

Restatement (Second) of the Law of Torts § 580A comment g (1977) 12

No. 82-1246

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSE CORPORATION,

Petitioner,

—against—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE NEW YORK TIMES COMPANY, CBS, INC., DOW JONES & COMPANY, INC., THE DUN & BRADSTREET CORPORATION, GANNETT CO., INC., NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE READER'S DIGEST ASSOCIATION, INC., THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE MAGAZINE PUBLISHERS ASSOCIATION and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *AMICI CURIAE*

This brief is submitted on behalf of The New York Times Company, CBS, Inc., Dow Jones & Company, Inc., The Dun & Bradstreet Corporation, Gannett Co., Inc., National Broadcasting Company, Inc., Newsweek, Inc., The Reader's Digest Association, Inc., The American Newspaper Publishers Asso-

ciation, The American Society of Newspaper Editors, The Association of American Publishers, Inc., The Magazine Publishers Association and The Reporters Committee for Freedom of the Press, as *amici curiae*.

Interest of *Amici Curiae*

The *amici* are publishers, broadcasters and associations of newspaper publishers and editors, book and magazine publishers and of journalists. The New York Times Company and its subsidiaries publish *The New York Times*, thirty other daily and weekly newspapers, books and three nationally circulated magazines, and own and operate television and radio stations and a cable television system. CBS, Inc. and National Broadcasting Company, Inc., which are engaged, through their news divisions, in the nationwide dissemination of news, operate national television and radio networks and own and operate television and radio stations. Dow Jones & Company, Inc. and its subsidiaries publish *The Wall Street Journal*, community daily newspapers, wire services, books and magazines. The Dun & Bradstreet Corporation, in addition to its well-known subscription credit information services, is also one of the country's leading publishers of business, consumer, corporate and product information including *Dun's Business Month* and approximately 30 other specialized business, technical and consumer magazines. Gannett Co., Inc. and its subsidiaries publish eighty-nine daily and thirty-two non-daily newspapers throughout the country and own and operate television and radio stations. Newsweek, Inc. publishes the weekly international news magazine, *Newsweek*, with a weekly net circulation of nearly 3 million copies nationwide. The Reader's Digest Association, Inc. publishes the monthly magazine, *Reader's Digest*, which has an average monthly domestic circulation of almost 18 million, and publishes Reader's Digest Condensed Books, trade books and general books such as *Home Improvements Manual*, *Complete Do-It-Yourself Manual*, *Back to Basics* and *Complete Guide to Needlework*.

late review of the evidentiary record is essential to protect both the constitutional interests at stake and the integrity of the process of constitutional adjudication. That is, the *amici* believe, precisely what this Court has long-since held to be the law.

Preliminary Statement

As briefed by the parties, this case involves the question of the proper scope of appellate review by a federal Court of Appeals in a case governed by *New York Times Co.* v. *Sullivan*. We address that question—one we believe was answered by *Sullivan* itself—in the remainder of this brief. Before doing so, we turn to the district court's treatment of the Consumers Union article and of the trial testimony about it. So erroneous is the district court opinion, so steeped in constitutional error are its premises, that there is reason for serious doubt that this case is even an appropriate vehicle for consideration of the permissible scope of appellate review.

The article in question reviewed various stereo loudspeakers including a distinctive product manufactured by petitioner Bose. It concluded:

> "When it came to music the [Consumers Union] panelists immediately noted a remarkable difference between the systems. The *Bose 901* seemed considerably more spacious and reverberant, actually to the point of giving the impression that the wall of the listening room had dropped away. The effect was rather dramatic and was felt from any listening position."

Then, in the only paragraph held actionable by the district court, the report stated:

> "But after listening to a number of recordings, it became apparent that the panelists could pinpoint the location of various instruments much more easily with a standard speaker system than with the *Bose* system. Worse, individual instruments heard through the *Bose*

> system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall."

It continued:

> "With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists."
>
> • • •
>
> "As for sound quality, if the *Bose 901* had been rated with the main group of tested speakers, it would have fallen between the high- and medium-accuracy groups. The overall sound was of good quality with impressive bass, considering the small speakers. But the combination of the equalizer and the speakers tended to overemphasize the middle bass, giving it a somewhat overly full, heavy sound.
>
> "We think the *Bose* system is so unusual that a prospective buyer must listen to it and judge it for himself." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1253-54, 1255, 1268 (D. Mass. 1981).

The district court concluded that the *Consumer Reports* article was false (and disparaging of petitioner's stereo system) because a Consumers Union engineer wrote that the sound produced by petitioner's speakers "tended to wander *about the room*" to describe a sensory perception when that perception, the court said, should better have been described as "moving *along the wall*." (Emphasis added) Since the engineer was "an intelligent person whose knowledge of the English language cannot be questioned," the court thereupon determined that it was "simply impossible for the Court to believe that he interpret[ed] a commonplace word such as 'about' to mean anything other than its plain, ordinary meaning." *Id.* at 1276-77.

There is no other basis for the district court's finding of liability. In fact, the court rejected attacks on the good faith of Consumers Union, *id.* at 1277, and on the honesty of its staff, *id.* But in inferring actual malice from its conclusion of falsity and its own view of what a reasonable, "intelligent" man would have understood the word "about" to mean, the district court plainly violated this Court's long-standing injunction that constitutional malice may be inferred neither from falsity, nor from what a reasonable, much less "intelligent," man might conclude. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 298 n.2 (1964) (Goldberg, J. concurring); *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 10-11 (1970); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 152 (1967).

The district court's conclusion that actual malice existed here thus cannot withstand appellate scrutiny under *any* standard. Indeed, this case provides no occasion for determining an appropriate standard of factual review at all, for the district court found no facts. It concluded—essentially on the basis of what it believed to be "the plain, ordinary meaning" of the word "about"—that Consumers Union in using that word to characterize a subjective sensory impression had acted with actual malice. The court made no findings of fact—the who, what, when, where of reality; it considered essentially undisputed "facts" in light of its understanding of actual malice. It was the district court's application of law to the facts with which the Court of Appeals properly took issue. Whatever the role of Federal Rule of Civil Procedure 52(a) in a case where fact finding has occurred, it has no application to the process by which the facts are simply assessed against the constitutional standard. That is what occurred here.

The same wooden approach which led the district court to detach one sentence in the review from the rest—and even a few words in one line from all the rest—led it into error in yet another fundamental way. This case does concern, after all, a review. The review describes uniquely subjective and difficult to articulate sensory reactions. It is no surprise in this context

that the few words at issue are preceded by language deliberately imprecise in nature—"tended to wander"—and followed by language allegorical in nature—"a violin appeared to be 10 feet wide . . . a piano stretched from wall to wall."[1] This is the language of opinion, language long held protected at common law as well as under First Amendment principles. Even at common law, reviews of art, music, literature, food, and the like enjoyed broad protection from liability under the libel laws. This Court's opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), built upon this foundation in recognizing the constitutional dimension of protection not only for reviews but for all forms of opinion.

Reviews held protected have been biting, negative—and often more than a little entertaining. The tradition of protecting such expression is long. From the now legendary havoc

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1 The elusive character of the sensory impression that the review sought to convey is reflected in the testimony (with which the district court took no issue) of the two Consumers Union engineers who participated in the listening test:

> *Seligson*:
>
> "As best as I could describe it, it would be that—if you can imagine peering at an array of lights from a distance, a very large array of lights from a distance so when you view them they seem like a blur of lights somewhere in front of you; and in this array of lights there may be individual lights which twinkle more strongly and focus one's attention upon them, but the twinkling shifts from point to point so that one's attention is drawn first to one spot, then to another, but it would be difficult to see whether at those times when one's attention shifts to a bright spot, whether one has suppressed the fact that there is a broad light source behind. This is something that occurs with time and it is a perception. It is difficult to recall precisely the manner in which I heard it, but that is about the best analogy that I could give you." (J.A. 181-82)
>
> *Lefkow*:
>
> "Yes, the piano seemed very wide in the sense that you could hear the various tones from the piano come in at many points right across the front of the room. And the violin, as the violin is played, the violin—the source of the notes seemed to change as he played different notes. As he went up and down the scale, I heard the notes coming from different points, spread out between the two speakers." (J.A. 231)

wrought by an Iowa reviewer of the "Cherry Sisters" at the turn of the century[2] to a recent review of a book about gambling,[3] from the savaging of a Louisiana restaurant[4] to a far more restrained (and *Consumer Report*-like) product review of a rifle,[5] courts have given a wide berth to the necessar-

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2 "Effie is an old jade of 50 summers, Jessie a frisky filly of 40, and Addie, the flower of the family, a capering monstrosity of 35. Their long skinny arms, equipped with talons at the extremities, swung mechanically, and anon waved frantically at the suffering audience. The mouths of their rancid features opened like caverns, and sounds like the wailings of damned souls issued therefrom. They pranced around the stage with a motion that suggested a cross between the danse du ventre and fox trot,—strange creatures with painted faces and hideous mien. Effie is spavined, Addie is stringhalt, and Jessie, the only one who showed her stockings, has legs with calves as classic in their outlines as the curves of a broom handle."

Cherry v. *Des Moines Leader*, 86 N.W. 323 (Iowa Sup. Ct. 1901); *see generally* Gartner, *Fair Comment*, 33 American Heritage 28 (Oct./Nov. 1982).

3 "Lyle Stuart's book, Casino Gambling for the Winner—is clearly misnamed. All you will learn from this book is how to lose. I consider the publication and sale of this work to be # 1 fraud ever perpetrated upon the gambling reader."

Stuart v. *Gambling Times, Inc.*, 534 F. Supp. 170, 171 (D.N.J. 1982).

4 The escargots, the reviewer observed, "are simply pretentious failures that leave a bad taste in one's mouth" and the "ugly sauce" on the duck is such that it "makes you want to scrape off the glop to eat the plain duck"; the trout sauce was described as "trout a la green plague"; one could also choose, according to the review, from such dishes "yellow death on duck." It summarized the cuisine succinctly: "T'aint Creole, t'aint Cajun, t'aint French, t'aint country American, t'aint good."

Mashburn v. *Collin*, 355 So. 2d 879, 887-88 (La. Sup. Ct. 1977)

5 "Bore Inspection Device Performs Poorly"

"The Safe-Site Bore Scope is a device for making it easier to examine the bore of a gun that has a closed breech end. It is made of optical-grade plastic, and is supposed to permit a better view of the breech end of the bore. However, excessive distortion is present in the device and this prevents a clear view of the bore."

Safe Site, Inc. v. *National Rifle Ass'n of America*, 253 F. Supp. 418, 419 (D.D.C. 1966).

ily subjective evaluations and characterizations of products, services and performances. But in this action, the district court afforded no such constitutionally mandated "breathing space" at all.

The *Consumer Reports'* review here contains no defamatory or disparaging statements of fact. As is often the case with reviews about consumer products, the views of Consumers Union concerning the worth of the Bose system permitted the public to make a far more informed judgment regarding the nature of the product involved. To read such reviews as anything but the expression of opinion is to put at peril an entire genre of journalism which provides important practical assistance to readers every day in every type of publication. The Court of Appeals correctly held that the constitutional malice standard could not be met here; but that is only one flaw in the theory of a case that should never have been permitted to proceed at all.

SUMMARY OF ARGUMENT

That the Court of Appeals engaged in an independent appellate review of the evidentiary basis for the district court's determination as to actual malice reflects nothing more than its adherence to long-settled principles mandated by *New York Times Co.* v. *Sullivan* and its progeny.

This brief first shows that such a review is essential to assure that liability for defamation will not impermissibly intrude upon constitutionally protected communication. Together with the subjective elements of actual malice and the exacting burden of proof required to establish it, independent appellate review serves to safeguard the liberties held protected by *Sullivan*.

The brief next analyzes the purpose and scope of such review and the critical function it performs in assessing the qualitative and quantitative sufficiency of the evidentiary basis for actual malice determinations.

Finally, the brief demonstrates that the Court of Appeals was correct in concluding that the clearly erroneous standard for purely factual review embodied in Rule 52(a) has little, if any, applicability to appellate review of actual malice determinations and that the Court of Appeals appropriately followed the independent review process mandated by *Sullivan* and its progeny.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONDUCTED AN INDEPENDENT REVIEW OF THE EVIDENTIARY BASIS FOR THE DISTRICT COURT'S CONCLUSION THAT THE STATEMENT CHALLENGED WAS PUBLISHED WITH ACTUAL MALICE

A. The Requirement Of Independent Appellate Review

Three bedrock principles first announced in *New York Times Co.* v. *Sullivan* have remained as clear and unchallenged through the years as they were at their inception. The first relates to the nature of actual malice itself: a statement is only made with actual malice, this Court said in *Sullivan*, when made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. Since *Sullivan* itself, actual malice consistently has been deemed subjective in nature, provable only by evidence of actual knowledge of falsity or "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). *See also Herbert* v. *Lando*, 441 U.S. 153, 173 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 331-32 (1974); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 56 (1971); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

The second principle stems from the importance of the first. The subjective test may only be met with proof of "convincing

clarity." *Sullivan*, *supra*, 376 U.S. at 285-86. As later rephrased in *Gertz*, actual malice must be established by "clear and convincing proof." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 342; *Rosenbloom* v. *Metromedia, Inc.*, *supra*, 403 U.S. at 52, 55; *Restatement (Second) of the Law of Torts* § 580A comment f (1977).[6]

The third principle—that at issue in this appeal—follows directly from the first two. In order to assure that the actual malice standard is properly applied and, in particular, that the heavy burden of proof on that issue is satisfied, this Court has consistently required an independent review of the record underlying a judgment based on actual malice. Thus, in *Sullivan*, *supra*, 376 U.S. at 285, this Court stated:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U.S. 331, 335; *see also One, Inc.* v. *Olesen*, 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. We must 'make an independent examination of the whole

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6 This Court has described a similarly exacting standard of proof as demonstrating " 'the degree of confidence our society thinks [the district court] should have in the correctness of the factual conclusions of a particular type of adjudication' " and "serves . . . to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979).

> record,' *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Footnote omitted).

Again, in *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971), this Court reiterated the "settled principle" that in determining whether the "constitutional rule" of actual malice has been correctly applied to the facts of a case this Court " 'will re-examine the evidentiary basis on which [the lower court's] conclusions are founded,' " *quoting Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951). *See also Rosenbloom* v. *Metromedia, Inc.*, *supra*, 403 U.S. at 53; *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, *supra*, 398 U.S. at 11; *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 730, 732-33; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*); *Restatement (Second) of the Law of Torts* § 580A comment g (1977).

The actual malice standard, the clear and convincing factual showing required to satisfy it, and the independent appellate review of that factual showing required to sustain it are thus the three constitutionally mandated safeguards of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Sullivan*, *supra*, 376 U.S. at 270. Together, they provide the requisite assurance that liability for defamation will not impermissibly intrude upon communication receiving First Amendment protection.

The appellate review required by *Sullivan* and its progeny is by no means unique to defamation cases. Twenty years prior to *Sullivan*, this Court in *Baumgartner* v. *United States*, 322 U.S. 665 (1944), a denaturalization proceeding, held that where the defendant's subjective state of mind was an essential issue of fact and the plaintiff had the burden of proof on that issue by evidence that was " 'clear, unequivocal and convincing' "—language strikingly similar to that in *Sullivan* and its progeny—the entire evidentiary record would be independently reviewed to ascertain whether the exacting standard of proof had been satisfied. 322 U.S. at 671.

In *Baumgartner*, the Government alleged and the lower courts found that defendant committed fraud at the time he was granted a certificate of naturalization as a United States citizen by falsely swearing that he had renounced allegiance to Germany and would support and defend the Constitution and laws of the United States. In reversing the judgment, this Court reviewed the evidentiary record on which it was based. As Justice Frankfurter's opinion concluded:

> "[T]he case made out by the Government lacks the solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." *Id.* at 670.

In so doing, the Court recognized:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. . . . [T]he 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. *See, e.g., Beyer* v. *LeFevre*, 186 U.S. 114. . . . Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an

illuminating test and is never self-executing." 322 U.S. at 670-71.

Later cases in the denaturalization area have consistently adhered to the principles set forth in *Baumgartner* and engaged in the same independent appellate review.[7]

This Court has also engaged in independent evidentiary reviews in areas of First Amendment concern other than defamation. In *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), a contempt proceeding against a newspaper editor for publishing editorials and cartoons critical of a Florida court, this Court held that it was "compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts." 328 U.S. at 335.[8]

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7 *See, e.g., Lim* v. *Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *United States* v. *Oddo*, 314 F.2d 115, 116 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *Chaunt* v. *United States*, 270 F.2d 179, 181 (9th Cir. 1959), *rev'd on other grounds*, 364 U.S. 350 (1960); *United States* v. *Montalbano*, 236 F.2d 757, 759 (3d Cir.), *cert. denied*, 352 U.S. 952 (1956); *United States* v. *Anastasio*, 226 F.2d 912, 916 (3d Cir. 1955); *Baghdasarian* v. *United States*, 220 F.2d 677, 680 (1st Cir. 1955); *Bechtel* v. *United States*, 176 F.2d 741, 744 (9th Cir. 1949); *Fix* v. *United States*, 176 F.2d 746, 748 (9th Cir. 1949); *Brenci* v. *United States*, 175 F.2d 90, 92 (1st Cir. 1949).

The Courts of Appeals have also extended the standard of proof and requirement of independent review to expatriation cases. *See Norio Kiyama* v. *Rusk*, 291 F.2d 10, 17 (9th Cir.), *cert. denied*, 368 U.S. 866 (1961); *Gonzalez-Jasso* v. *Rogers*, 264 F.2d 584, 587 (D.C. Cir. 1959); *Monaco* v. *Dulles*, 210 F.2d 760, 762 (2d Cir. 1954); *Lehmann* v. *Acheson*, 206 F.2d 592, 599 (3d Cir. 1953).

8 The special role of the appellate courts in reviewing determinations of clear and present danger had long since been emphasized by Justice Brandeis. In his dissenting opinion in *Schaefer* v. *United States*, 251 U.S. 466, 483 (1920), he stated that: "[T]he judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error."

Similarly, in *Niemotko* v. *Maryland*, 340 U.S. 268 (1951), the Court reversed as violative of the First and Fourteenth Amendments disorderly conduct convictions of two Jehovah's Witnesses who had held a meeting in a public park after their application for a permit had been denied. Recognizing that the case involved a claim of denial of rights under the Constitution, the Court held that it was not bound by the conclusions of lower courts but would "reexamine the evidentiary basis" on which the convictions were founded. 340 U.S. at 271. *See also Jacobellis* v. *Ohio*, 378 U.S. 184, 189 (1963) (obscenity case in which the Court "recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts").

Following the mandate of this Court in *Sullivan* and its progeny, the Court of Appeals here undertook a careful independent review of the evidentiary basis on which the district court concluded that petitioner had satisfied its burden on the issue of actual malice. Its approach was consistent with the teaching of *Sullivan* and its progeny, and its conclusion that the burden had not been satisfied was fully warranted.

B. The Purpose And Scope Of Independent Appellate Review

It is perhaps simplest to begin by stating what independent appellate review does not entail. It does not involve a re-assessment of the credibility of witnesses or their demeanor at trial—issues which of necessity must be left to the trier of fact. Nor does it involve a re-evaluation of findings of historical fact, such as whether, when and by whom a challenged statement was made. Such findings would be properly reviewable under the clearly erroneous standard of Rule 52(a).

In contrast, independent appellate review focuses on the cumulative effect, both qualitatively and quantitatively, of the facts found by the district court. In conducting such a review, the appellate court's role is to assess (i) whether the district court properly applied the constitutional standard of actual malice to the facts and (ii) whether the facts in the record and

any inferences that may properly be derived therefrom satisfy the requirement that actual malice be established by clear and convincing proof. The purpose of the review is not to re-try the case but to scrutinize with special care what has been established and to determine if—as this Court said in *Baumgartner*—the "whole mass of evidence," properly evaluated, rises to the level of constitutional malice.

To sustain a finding of actual malice, the evidence must be both qualitatively probative of actual malice and quantitatively sufficient to meet the requirement of clear and convincing proof. Evidence, for example, that the publisher of a challenged statement failed or refused to issue a retraction or correction may well be qualitatively deficient because it is not probative of the issue of the publisher's subjective intent at the time the statement was made. *See New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 286-87 (defendant's failure to retract statement upon Alabama Governor's demand held "not adequate evidence of malice for constitutional purposes").

Similarly, where the record contains only proof of falsity or evidence that a reasonably prudent man would not have published the statement, the record would be quantitatively insufficient to satisfy the standard of clear and convincing proof as to the defendant's subjective state of mind. *See St. Amant* v. *Thompson*, *supra*, 390 U.S. at 731; *Beckley Newspapers Corp.* v. *Hanks*, *supra*, 389 U.S. at 84; *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 298 n.2 (Goldberg, J., concurring). In such a case, the quantum of evidence does not rise to clear and convincing proof of constitutional malice.

The critical role played by this review process in protecting constitutional rights and maintaining the integrity of constitutional adjudication is demonstrated dramatically by the frequency with which the Courts of Appeals have reversed district court judgments on the issue of actual malice. Since the *Sullivan* ruling by this Court in 1964, federal Courts of Appeals have ruled on the adequacy of proof of actual malice

in 61 reported defamation cases.[9] In the 41 cases appealed by plaintiffs, 10 were reversed; of the 20 appeals by defendants in which Courts of Appeals ruled on that issue, 13 (in addition to this one) were reversed. Thus, 70% of appeals of defendants with respect to findings of or rulings about actual malice led to reversals. When analysis is confined to review after a trial, 71% of defendants' appeals in cases involving rulings on actual malice have led to reversals.

Given the fact that only 19% of all civil cases heard by federal Courts of Appeals not involving the United States are reversed,[10] the strikingly high reversal rates in actual malice cases and particularly in cases in which actual malice was held to exist at the trial court level are themselves persuasive evidence of the need for the careful appellate scrutiny of actual malice determinations. This Court has mandated just such scrupulously careful review. Independent review of the entire record in such cases is the only means of assuring that the standards established in *Sullivan* and its progeny will be followed.

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9 The figures set forth in this paragraph are the results of a study undertaken by the *amici*, which is annexed to this brief as Annex A. The figures are consistent with a recently completed study undertaken by the Libel Defense Resource Center, an information clearinghouse that monitors developments in the defamation field. LDRC Study, "Independent Appellate Review in Libel Actions Since *New York Times* v. *Sullivan*," to be published in LDRC Bulletin No. 7 (July 15, 1983).

10 *See, e.g., 1982 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19.2% of private civil actions not including prisoner petitions reversed or denied); *1981 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19% of private civil actions not including prisoner petitions reversed or denied); *1980 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.6% of private civil actions reversed or denied); *1979 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.9% of private civil actions reversed or denied).

C. The Applicability Of Rule 52(a) Of The Federal Rules Of Civil Procedure

Rule 52(a) requires that in all actions tried without a jury or with an advisory jury the district court "shall find the facts specially and state separately its conclusions of law thereon. . . ." The district court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A district court's conclusions of law or its application of legal principles to established fact, however, are not subject to the clearly erroneous standard of review. *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).

This Court has adverted to "the vexing nature of the distinction between questions of fact and questions of law," *Pullman-Standard* v. *Swint*, *supra*, 456 U.S. at 288, as well as to the failure of Rule 52 to "furnish particular guidance with respect to distinguishing law from fact." *Id.* Although the Court has expressly declined to decide whether the Rule 52(a) standard applies to mixed questions of law and fact, it has observed that there is support in its decisions for the proposition that an appellate court may review independently district court conclusions on such questions. *Pullman-Standard* v. *Swint*, *supra*, 456 U.S. at 289 n.19. Whether one labels the determination a conclusion of law, the application of law to fact, or even a mixed question of law and fact, the clear holding of the unbroken line of decisions by this Court cited above is that the determination of the adequacy of the evidence to support a conclusion of actual malice is reviewable independently by the appellate courts and is not subject to the more limited standard available under Rule 52.

The Court of Appeals correctly concluded that in conducting its review it was "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a)" but must "independently examin[e] the record to ensure that the district court has applied properly

the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189, 195 (1st Cir. 1982).

Rule 52(a)'s clearly erroneous standard is inapplicable to review of actual malice determinations for several reasons. As discussed above, the independent review process does not entail a re-examination of the district court's judgments on credibility. Indeed, the Court of Appeals here expressly acknowledged that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." 692 F.2d at 195.[11]

Similarly, while it reached a conclusion contrary to the district court as to the sufficiency of the evidentiary record to support a determination of actual malice, the Court of Appeals did not reject, or make contrary findings on, any matters of historical fact found by the district court. Thus, regarding those matters as to which Rule 52(a) applied, its limitations were observed. Rule 52(a) was appropriately recognized as being inapplicable to the district court's conclusion that actual malice had been established by clear and convincing evidence.

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11 Petitioner contends that the Court of Appeals disregarded or rejected the district court's credibility judgment as to Seligson's testimony that he regarded the phrases "about the room" and "along the wall" as substantially synonymous. That contention, however, is predicated on a misperception of what the appellate court concluded. The Court of Appeals did not dispute the district court's right to make a credibility determination, but rather the permissibility of the conclusion the district court reached from what was an objective, not a subjective approach to actual malice. The district court determined that petitioner had established subjective actual malice by clear and convincing proof based solely on the court's conclusion that no reasonable man in Seligson's position could have interpreted the two phrases as meaning the same thing. As the Court of Appeals correctly held, the district court's conclusion was tantamount to finding actual malice based on proof of falsity alone and, as such, was improper as a matter of law. It was not any credibility assessment that the Court of Appeals questioned; it was the qualitative and quantitative significance that could, consistent with constitutional principles, appropriately be attributed to the district court's conclusion that no reasonable man could have understood the words as Mr. Seligson did.

The independent appellate review process is thus not addressed to Rule 52(a) "findings of fact" at all but to the cumulative effect of the evidentiary record adduced to establish actual malice. As this Court stated in *Baumgartner, supra*, 322 U.S. at 671, and recently reaffirmed in *Pullman-Standard* v. *Swint, supra*, 456 U.S. at 286 n.16, in cases in which a clear and convincing standard of proof applies, "the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess." In such circumstances, the lower courts' "conclusions" are not "pure findings of fact" subject to the limitations of Rule 52(a), but "findings that 'clearly impl[y] the application of standards of law.' " *Pullman-Standard* v. *Swint, supra*, 456 U.S. at 286 n.16, *quoting Baumgartner* v. *United States, supra*, 322 U.S. at 671.[12]

In fact, when a "trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard," *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). *See also Pullman-Standard* v. *Swint, supra*, 456 U.S. at 287 ("if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis"); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963) (a district court's "conclusion derived from [its] application of an improper standard to the facts . . . may be corrected as a matter of law"). Based on its review of the record, the Court of Appeals concluded that "[t]o find actual malice in this case would be to interpret that concept to require little more than proof of falsity. . . ." Such a misinterpreta-

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12 *See also Watts* v. *Indiana*, 338 U.S. 49, 51 (1949):

> " '[I]ssue of fact' is a coat of many colors. It does not cover a conclusion drawn from incontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication."

tion by a district court of the applicable constitutional standards is plainly correctable as a matter of law by an appellate court.

CONCLUSION

So slight is the distinction between words the trial court would have held non-actionable—"tended to wander along the wall"—and the words actually used by Consumers Union—"tended to wander about the room"—that there is some temptation in this case to discount its import. But the very triviality of these verbal distinctions accentuates the risks of this action. If critical reviews are to be subjected to such narrowly focused second-guessing, their continued viability as a genre of commentary inevitably would be endangered.

Similarly, although the issue of the appropriate scope of appellate review is one not necessarily presented by this appeal, any retreat in this case from the law as previously declared and as interpreted by the Court of Appeals would threaten all journalism. As the twentieth anniversary of one of the monuments of this Court, *New York Times Co.* v. *Sullivan*, approaches, it is time to reaffirm the continued strength of the foundations on which it rests.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ANNEX A

From 1964, when *New York Times Co.* v. *Sullivan* was decided, through the end of 1982, the federal Courts of Appeals ruled on the issue of whether actual malice had been established on the record in 61 reported defamation cases. These appeals were resolved as follows:

Party Appealing	*Affirmed*	*Reversed*	*Total*
Plaintiff	31	10	41
Defendant	6	14	20
Total	37	24	61

While 39% of these cases were reversed on an overall basis, 70% of the appeals initiated by the defendant resulted in reversal. When appeals of summary judgment and dismissal rulings are eliminated from consideration and only appeals from trials are considered, 25 cases remain and the results differ somewhat:

Party Appealing	*Affirmed*	*Reversed*	*Total*
Plaintiff	8	3	11
Defendant	4	10	14
Total	12	13	25

In 52% of these appeals, which followed trials, the district court was reversed on the issue of actual malice. Of these cases in which the defendant was the appellant, 71% were reversed.

The frequency of "actual malice" reversals may be contrasted with the overall 19% reversal and denial rate in the Courts of Appeals for all civil actions that do not involve the United States. *See, e.g., 1982 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (19.2% of private civil actions not including prisoner petitions reversed or denied); *1981 Annual Report of the Director of the Administrative Office of the United States*

Courts, Table B-1 (19% of private civil actions not including prisoner petitions reversed or denied); *1980 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.6% of private civil actions reversed or denied); *1979 Annual Report of the Director of the Administrative Office of the United States Courts*, Table B-1 (18.9% of private civil actions reversed or denied).

The methodology for the study was as follows. A LEXIS search was made for all reported cases decided by the federal Courts of Appeals through December 31, 1982, in which *New York Times Co.* v. *Sullivan* was cited and the words "actual malice" appeared. This initial search yielded 133 cases. This list was supplemented by and checked against the circuit court citations to *New York Times Co.* v. *Sullivan* compiled in Shepard's Federal Citations. In addition, the Libel and Slander topic of West's Federal Practice Digest 2d was examined in order to ensure that no cases were overlooked. After the elimination of those decisions that were not defamation cases and those defamation cases that did not include a discussion or holding on the actual malice standard that was either the sole or an alternate basis for the Court's opinion, the 61 cases referenced here remained.

I. Appeals by plaintiff; judgment affirmed (31 cases)

1. *Gaines* v. *Cuna Mutual Insurance Society*, 681 F.2d 982 (5th Cir. 1982) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)
2. *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982) (summary judgment for defendants affirmed because no evidence as to actual malice presented)
3. *Street* v. *National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. dis'd*, 454 U.S. 1095 (1981) (directed verdict for defendant affirmed in case in which no evidence as to actual malice presented)

4. *Church of Scientology* v. *Cazares*, 638 F.2d 1272 (5th Cir. 1981) (summary judgment for defendant affirmed because statement not capable of defamatory meaning and actual malice not proven)

5. *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

6. *Yiamouyiannis* v. *Consumers Union of United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980) (summary judgment for defendant affirmed because no evidence as to actual malice presented)

7. *Long* v. *Arcell*, 618 F.2d 1145 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981) (judgment n.o.v. for defendant affirmed because actual malice not proven)

8. *Dickey* v. *CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978) (judgment for defendant affirmed because actual malice not proven)

9. *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

10. *Hutchinson* v. *Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979) (summary judgment for defendant affirmed in case in which actual malice not proven)

11. *Wolston* v. *Reader's Digest Ass'n*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd on other grounds*, 443 U.S. 157 (1979) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

12. *Arnheiter* v. *Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978) (summary judgment for defendant affirmed because no evidence as to actual malice)

13. *Pierce* v. *Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)

14. *Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (summary judgment for defendant on defamation claim affirmed in case in which there was no issue of material fact as to actual malice)

15. *Fadell* v. *Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977) (summary judgment for defendant affirmed in case in which no evidence as to actual malice presented)

16. *Walker* v. *Cahalan*, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

17. *Grzelak* v. *Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975) (summary judgment for defendant affirmed in case in which actual malice not proven)

18. *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) (judgment n.o.v. for defendant affirmed because actual malice not proven)

19. *Perry* v. *Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir.), *cert. denied*, 419 U.S. 883 (1974) (summary judgment for defendant affirmed in case in which actual malice not proven)

20. *Gertz* v. *Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds*, 418 U.S. 323 (1974) (judgment n.o.v. for defendant affirmed because actual malice not proven)

21. *Mistrot* v. *True Dectective Publishing Corp.*, 467 F.2d 122 (5th Cir. 1972) (*per curiam*) (summary judgment for defendant affirmed because no material issue of fact as to actual malice)

22. *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (summary judgment for defendant affirmed in case in which actual malice not proven)

23. *Casano* v. *WDSU-TV, Inc.*, 464 F.2d 3 (5th Cir. 1972) (directed verdict for defendant affirmed in case in which evidence as to malice was insufficient)

24. *Waskow* v. *Associated Press*, 462 F.2d 1173 (D.C. Cir. 1972) (*per curiam*) (summary judgment for defendant affirmed because no evidence as to actual malice presented)

25. *Cerrito* v. *Time, Inc.*, 449 F.2d 306 (9th Cir. 1971) (*per curiam*) (summary judgment for defendant affirmed in case in which actual malice not proven)

26. *Medina* v. *Time, Inc.*, 439 F.2d 1129 (lst Cir. 1971) (*per curiam*) (summary judgment for defendant affirmed because no genuine issue as to actual malice existed)

27. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970) (summary judgment for defendant affirmed because no evidence as to actual malice existed)

28. *United Medical Laboratories* v. *Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969) (summary judgment for defendant affirmed in case in which no evidence as to actual malice existed)

29. *Walker* v. *Pulitzer Publishing Co.*, 394 F.2d 800 (8th Cir. 1968) (summary judgment for defendant affirmed because no evidence as to actual malice existed)

30. *Baldine* v. *Sharon Herald Co.*, 391 F.2d 703 (3d Cir. 1968) (judgment n.o.v. for defendant affirmed because actual malice not proven)

31. *Pauling* v. *Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967) (judgment for defendant on jury verdict affirmed in case in which actual malice not proven)

II. Appeals by plaintiff; judgment reversed (10 cases)

1. *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 1277 (1983) (summary judgment for defendant reversed in case in which issue of material fact existed as to actual malice)

2. *Rebozo* v. *Washington Post Co.*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981) (summary judgment for defendant reversed because issue of material fact existed as to actual malice)

3. *Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (summary judgment for defendants reversed because evidence suggested plaintiffs could prove actual malice)

4. *Alioto* v. *Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975) (judgment n.o.v. for defendant reversed because evidence was sufficient for jury to draw inference of actual malice)

5. *Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974) (directed verdict for defendant reversed because evidence was sufficient for issue of actual malice to be decided by jury)

6. *Gordon* v. *Random House, Inc.*, 486 F.2d 1356 (3d Cir. 1973), *vacated*, 419 U.S. 812 (1974) (summary judgment for defendant reversed in case in which genuine issue of material fact existed as to reckless disregard)

7. *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (summary judgment for defendant reversed in case in which question of actual malice was for the jury)

8. *Pape* v. *Time, Inc.*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971) (directed verdict for defendant reversed because evidence of actual malice was sufficient for submission to jury)*

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* In its opinion in *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), this Court emphasized that it was familiar with and approved of appellate courts' re-examination of "the evidentiary basis" upon which lower court decisions bearing on constitutional rights rested. See text at p. 12, *supra*.

9. *Walker* v. *Courier-Journal and Louisville Times Co. Inc.*, 368 F.2d 189 (6th Cir. 1966) (*per curiam*) (dismissal of complaint reversed because plaintiff should have opportunity to offer evidence on actual malice)

10. *Pape* v. *Time, Inc.*, 354 F.2d 558 (7th Cir. 1965), *cert. denied*, 384 U.S. 909 (1966) (summary judgment for defendant reversed in case in which issue of material fact existed as to actual malice)

III. Appeals by defendant; judgment affirmed (6 cases)

1. *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (judgment for plaintiff affirmed in case in which district court found existence of actual malice)

2. *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (remitted judgment for plaintiff affirmed in case in which actual malice was proved)

3. *Davis* v. *Schuchat*, 510 F.2d 731 (D.C. Cir. 1975) (judgment for plaintiff affirmed because there was adequate evidence of actual malice)

4. *Vandenburg* v. *Newsweek, Inc.*, 441 F.2d 378 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971) (denial of defendant's motion for summary judgment affirmed because defendant failed to show no issue of material fact existed as to actual malice)

5. *Time, Inc.* v. *Ragano*, 427 F.2d 219 (5th Cir. 1970) (denial of defendant's motion for summary judgment affirmed because genuine issue of material fact as to actual malice did exist)

6. *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (judgment for plaintiff on jury verdict affirmed in case in which evidence of actual malice did exist)

IV. Appeals by defendant; judgment reversed (14 cases)

1. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 692 F.2d 189 (lst Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (1983) (judgment for plaintiff reversed because evidence did not establish actual malice)

2. *Ryan* v. *Brooks*, 634 F.2d 726 (4th Cir. 1980) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)

3. *Brewer* v. *Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)

4. *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (jury verdict for plaintiff reversed in case in which evidence did not establish actual malice)

5. *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (judgment for plaintiff on jury verdict reversed in case in which evidence did not establish actual malice)

6. *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (judgment for plaintiff on jury verdict reversed in case in which evidence did not establish actual malice)

7. *Drotzmanns, Inc.* v. *McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974) (judgment for plaintiff on jury verdict reversed and case remanded for new trial in case in which evidence did not establish actual malice)

8. *Firestone* v. *Time, Inc.*, 460 F.2d 712 (5th Cir.), *cert. denied*, 409 U.S. 875 (1972) (judgment for plaintiff reversed because evidence did not establish actual malice)

9. *Time, Inc.* v. *Johnston*, 448 F.2d 378 (4th Cir. 1971) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

10. *Dacey* v. *Florida Bar, Inc.*, 427 F.2d 1292 (5th Cir. 1970) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

11. *Rosenbloom* v. *Metromedia, Inc.*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971) (remitted judgment for plaintiff reversed because evidence did not establish actual malice)

12. *Time, Inc.* v. *McLaney*, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969) (denial of defendant's motion for summary judgment reversed because there was no issue of material fact as to actual malice)

13. *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (denial of defendant's motion for summary judgment reversed because no issue of material fact as to actual malice)

14. *New York Times Co.* v. *Connor*, 365 F.2d 567 (5th Cir. 1966) (judgment for plaintiff on jury verdict reversed because evidence did not establish actual malice)

NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON OCTOBER 31, 1983 (52 LW 3342), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

OCT 24 1983

NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOSE CORPORATION, INC.,
Petitioner,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT CONSUMERS UNION

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MOTION OF MARIE SHIBUYA-SNELL, DIRECTOR OF THE DEPARTMENT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Marie Shibuya-Snell, Director of the California Department of Consumer Affairs, requests permission to file the attached brief as an amicus curiae pursuant to Rule 36.

In her capacity as Director of the California Department of Consumer Affairs, Marie Shibuya-Snell has an empiricist's understanding of the value of publications like Consumer Reports magazine. The Department of Consumer Affairs received 101,000 complaints about products and services from consumers in 1982 alone.

Modern products and services are complex and advertised to induce the public to buy. Consumers cannot effectively separate the glitter from the gold in

advertising. Who among us can evaluate for ourselves a product as common and as simple, by today's standards, as a transistor radio or a home computer?

Consumer Reports, a specialty magazine, is a relatively unique resource for the perplexed ponderer of radio wiring and other electronic mysteries. A great many other publishers, as well as most broadcasters, also devote portions of their communication with the public to what may be termed consumer reporting and they, too, benefit the public.

In addition, the focus of consumer purchasing power disciplines and benefits the economic process which we refer to as the market. The millions of individual consumer choices made daily are many tiny rivulets of information which "trickle up" to help shape the larger economic world. More than most economies of the world, ours is both informed by consumers and supported financially by consumers; variety in the sources of available information about goods

and services is a condition precedent to intelligent consumer choice in the market and the efficient operation of our economy.

Consumers, more importantly, are constitutionally entitled to a variety of sources of information. There is an overlay of the marketplace of ideas upon that of goods and services. A ruling against Consumer's Union in this case will deter the publication of information in contravention of the first amendment and check the free flow of information at its source.

The people's constitutional right to an unfettered and fearlessly informative press militates against adopting the position asserted by Bose Corporation, Inc., in this case and more than justifies the judicial resources expended to assure that the first amendment continues to play a meaningful role in our society.

The respondent, Consumer's Union, has consented to the filing of this brief supporting its position. The petitioner, Bose Corporation, Inc., has withheld consent

to the filing of this brief. With respect to the late filing of this brief, Amicus Curiae begs the Court's indulgence and acknowledges that this brief is not timely. Amicus Curiae hopes that the Court will nonetheless accept the attached brief for filing because of the importance of the issue and the arguments not made by others which are asserted, e.g., that governmental action which has a special and inhibiting effect on the press runs afoul of the first amendment and cannot be approved by this Court. Cf. Minneapolis Star and Tribune v. Minn. Com'r of Rev., __ U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

Marie Shibuya-Snell, as Director of the California Department of Consumer Affairs, has a clear statutory mandate to represent the interests of California's approximately 24 million consumers. See California Business and Professions Code sections 301, 310, 320 and 321. In view of the foregoing, the Director requests permission to file the attached brief

arguing the particular interest of consumers in received information, the significance of the procedural rules at issue in assuring that publishers and broadcasters maintain a continuing flow of information to consumers, and the decisions of this Court which the Director respectfully contends must control the outcome in this case.

Dated: October ___, 1983.

Respectfully submitted,

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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOSE CORPORATION, INC.,
Petitioner,

vs.

CONSUMERS UNION OF THE UNITED STATES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
FIRST CIRCUIT COURT OF APPEALS

BRIEF OF MARIE SHIBUYA-SNELL, DIRECTOR, CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT CONSUMERS UNION

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	7
I. PRELIMINARY STATEMENT	7
II. THE FIRST AMENDMENT INSURES COMMUNICATION	9
III. REQUIRING PROOF OF ACTUAL MALICE IN THIS CASE ASSURES COMMUNICATION ABOUT THE ECONOMY AND GENERATES A MORE EFFICIENT ALLOCATION OF SOCIAL AND ECONOMIC RESOURCES	14
IV. THE INDEPENDENT REVIEW OF THE EVIDENCE RULE AND THE CLEAR AND CONVINCING EVIDENCE STANDARD ARE BUT APPLICATIONS OF THE GENERAL PRINCIPLE THAT GOVERNMENT ACTION WHICH IMPINGES UPON RIGHTS AND LIBERTIES SECURED BY THE FIRST AMENDMENT MUST BE SUBJECT TO AN EXACTING AND RIGOROUS OR STRICT JUDICIAL REVIEW	17
V. THIS COURT SHOULD NOT CARVE OUT A SMALL GROUP OF PUBLISHERS FOR SPECIAL TREATMENT AND SEGMENT THE MEDIA BY PROVIDING A LOWER LEVEL OF CONSTITUTIONAL PROTECTION IN PRODUCT DISPARAGEMENT CASES	30
VI. CONCLUSION	34

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

First Amendment of the United States Constitution . . . 1-5, 8, 9, 17-22, 25, 31, 34, 35

Seventh Amendment of the United States Constitution 3

Fourteenth Amendment of the United States Constitution 22

CASES

Bose v. Consumers Union of U.S., Inc., 508 F.Supp. 1249 (D. Mass. 1981) 12, 27

Bose Corporation v. Consumers Union of United States, Inc., 692 F.2d 189 (1st Cir. 1982) cert. granted U.S. No. 82-1246 27

Brandenburg v. Ohio, 395 U.S. 444 (1969) 22

Bridges v. California, 314 U.S. 252 (1941) 4, 30

Cantwell v. Connecticut, 310 U.S. 296 (1940) 18

Citizens Against Rent Control v. Berkeley, California, 454 U.S. 290 (1981) 18

Consolidated Edison Company of New York, Inc., v. Public Service Commission of New York, 447 U.S. 530 (1980) 8

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 14

Edwards v. South Carolina, 372 U.S. 229 (1963) 26

F&J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F.Supp. 292 (N.D. Ohio 1974) 12, 13

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) . . . 4, 11

Fiske v. Kansas, 274 U.S. 380 (1927) 22-26, 30

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8, 15

Greenbelt Cooperative Publishing Co. v. Bresler, 398 U.S. 6 (1970) . . 20

Inwood Laboratories, Inc. v. Ives, 456 U.S. 844 (1982) 28, 29

Minneapolis Star and Tribune v. Minnesota Com'r of Rev., ___U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) 5, 30-32

NAACP v. Claiborne Hardware, __ U.S. __, 73 L.Ed.2d 1215 (1982) 22

New York Times v. Sullivan, 376 U.S. 254 (1964) 2, 3, 5, 8, 14, 15, 17-21, 25, 28, 31, 32, 34

Sterling v. Constanin, 287 U.S. 378 (1932) 3

Thornhill v. Alabama, 310 U.S. 88 (1940) 11

United Medical Laboratories, Inc. v. Columbia Broadcasting, Inc., 404 F.2d 706 (9th Cir. 1968) cert. denied 394 U.S. 921 (1969) 12, 13

Virginia Board of Pharmacy v. Virginia Citizen's Advisory Council, 425 U.S. 748 (1976) 10, 11

STATUTES

28 U.S.C. section 2072 4

Kansas Criminal Syndicalism Act . . 22, 23

Ohio Criminal Syndicalism Act 22

RULES

Federal Rule of Civil Procedure 52(a) 4, 8, 28, 29, 33

OTHER SOURCES

"How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper," The Wall Street Journal, September 29, 1983 . . 33

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is fully set forth in the foregoing Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

This case is about the first amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

Freedom of speech and press are priceless rights. This case highlights the importance of those rights to the people as consumers of goods, services and information. It specifically highlights the essential

role of a constitutionally mandated special scope of review which permits a reviewing court to be certain that fact finders have given deference to the constitutional prohibition with respect to those rights.

Without that bulwark against the social, economic, and political forces which, at various points in our history, have inclined us to make and enforce laws which abridge our freedom to speak, to publish, and to be informed, our society would long ago have lost something that the drafters of the first ten amendments believed was so integral to the working of the national system which they had fought to establish. Perhaps that is why they put that prohibition first.

The first amendment was woven into the law of libel in New York Times v. Sullivan, 376 U.S. 254 (1964). The actual malice standard is now an established part of our libel law. The constitutionally mandated broader and stricter scope of review is also an established part of our first amendment

jurisprudence. Both are intended to and do preserve communication.

The constitutionally based scope of review has a substantial history. 1/ More recently, the rule has been applied in first amendment and other constitutional cases where the resolution of the constitutional issue turns on findings of fact. See, e.g., New York Times v. Sullivan, supra, at 284, 285, and cases cited.

This special review is essential because some constitutional violations can only be discerned by first answering questions about what the facts are and whether the fact finder has given the constitution its due. The constitutionally based scope of review at issue herein has been upheld against attacks grounded in the seventh amendment. New York Times v. Sullivan, Id. at 285, n. 26. The rule is no less important when the fact finder is a

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1/ See, e.g., Sterling v. Constantin, 287 U.S. 378 (1932) and cases cited at 398.

judge. In the often emotionally charged environment in which cases of this kind arise, even judges can lose perspective. See, e.g., Bridges v. California, 314 U.S. 252, 271-275 (1941), in which first amendment freedoms were held infringed when a newspaper and labor organizer were adjudged in, and fined for, contempt of court for publishing their rather different views regarding a litigated labor dispute while the case proceeded in the court.

The Federal Rules of Civil Procedure are promulgated by this Court and adopted by Congress. 2/ Many states have procedural rules similar to Rule 52(a). 3/ The only rule for appellate review of constitutional (or unconstitutional) fact finding which can effectively guide a reviewing court in

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2/ 28 U.S.C. section 2072.

3/ But this Court has always been the final arbiter of constitutional law and this Court has consistently held that "states do not have greater latitude than Congress to abridge freedom of speech." First National Bank of Boston v. Bellotti, 435 U.S. 765, 780, n. 16 (1978).

examining findings of fact which control the outcome in cases asserting first amendment and other constitutional violations is that reaffirmed by the Court in New York Times v. Sullivan, supra, and carried forward since.

Furthermore, the Court cannot and should not accord to defendants who are sued for product disparagement, rather than corporate or other defamation, a lower level of constitutional protection. Cf. Minneapolis Star and Tribune v. Minn. Com'r of Rev., __ U.S. __, 103 St.Ct. 1365, 75 L.Ed.2d 295 (1983).

Efficiency in judicial administration is a very important value. However, those who invented the underpinnings of the American dream were not primarily concerned, in 1791, with efficiency; nor can we be in 1983. There is a higher law, that of the first amendment of the United States Constitution.

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ARGUMENT

I

PRELIMINARY STATEMENT

The Court's decision in this case will affect the continuing validity of rules which accord to the people the rights to be free to hear, to read and to inform themselves. The Court's decision could threaten the special significance to consumers of mass communicators such as publishers and broadcasters who are the *sine qua non* of communication regarding nearly all matters for all consumers of information.

Is there some meaningful distinction between libel laws (relating to persons) and product disparagement laws (relating to

products and services) when the frame of reference is free speech and press? Cases like Consolidated Edison Company of New York, Inc., v. Public Service Commission of New York, 447 U.S. 530 (1980), New York Times v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), read together, argue forcefully against such a distinction.

The specific question certified by this Court is whether the court of appeals should have been bound by Federal Rule of Civil Procedure 52(a) in reviewing the trial court's record in this case. The arguments to follow further elucidate the important reasons why the answer to that question must be a thorough affirmation of our continuing commitment to the first amendment of the United States Constitution.

II

THE FIRST AMENDMENT INSURES COMMUNICATION

The first amendment guarantees the highly valued but still fragile exchange of thoughts, images, ideas, and information by which persons and organizations of every ilk communicate with each other and the public.

Consumer Reports, an established citizen of the world of communication, is published by a non-profit union of consumers. By providing third party views on products and services offered to the public, this magazine performs a role which is important to consumers, to the marketplace and, ultimately, to our society as a whole.

Consumer reporting, like all our myriad and marvelous expressive activities, is not only a fragile form of communication. It is also an often controversial form of communication. Such communication

is usually welcomed by consumers; manufacturers, suppliers and retailers have been less cordial when their products and services have been criticized. It is nonetheless well established that the constitution protects such communication.

This Court has had occasion, in a variety of cases, to stress the constitutional protection afforded the interests of those who want to receive communication. See, e.g., Virginia Board of Pharmacy v. Virginia Citizens Advisory Council, 425 U.S. 748, 756, 757 (1976) and cases cited therein. As Justice Blackmun observed (in resolving the question of whether consumers had standing to enjoin enforcement of statutes which prevented the publication of prescription drug prices by pharmacists):

> "... the protection afforded is to the communication, to its source and recipients both. This is clear from the decided cases." Id. at 756.

Speech, quite literally, does not exist without the listener's ear. The role of the

press (both print and electronic) is a function of its readers, listeners, and viewers.

More specifically, it is well established that the people, as consumers (Id. at 764-766) and as interested and intelligent participants in our society (Id. at 762-764), are constitutionally entitled to a free flow of information about matters economic, both large and small. See Thornhill v. Alabama, 310 U.S. 88, 101-105 (1940) and First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978), in which the importance to our society of a widely and well informed public is emphasized.

Businesses sometimes object to consumer reporting and commentary, particularly when the commentary does not accord with the image of the product or service that the business has sought to fix in the public eye through advertising and other promotional activities. Regrettably, such objections can be and often are expressed in the form of ultimately unmeritorious but very

expensive defamation lawsuits; publications like Consumer Reports can be easily driven out of print.

Without publications like Consumer Reports, the consuming public would lose the ability to evaluate products and services in a relatively painless way by reading reports by third parties which can supplement a personal examination and the supplier's advertising.

Furthermore, as the district court in this case cautions:

> "The public's interest in obtaining information of this type is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtaining information about other people. Information obtained from product commentators often relates to health and safety problems in consumer products. See, e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969); F&J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc., 373 F.Supp. 292 (N.D. Ohio 1974)." Bose v. Consumers Union of United States, Inc., 508 F.Supp. 1249, 1271 (D. Mass. 1981).

The United Medical Laboratories, Inc. case related to allegedly inaccurate tests performed by a mail order medical laboratory; F&J Enterprises, Inc. was litigated because of reporting about an allegedly unsafe toy for children. It cannot be disputed that consumers receive informational benefits from publications like Consumer Reports, from other publishers, and from media broadcasters which will become inaccessible if mass communicators must periodically run a gantlet of high powered litigation lawyers armed with word processors, unlimited budgets, unlimited imagination, and a great deal of time.

III

REQUIRING PROOF OF ACTUAL MALICE IN THIS CASE ASSURES COMMUNICATION ABOUT THE ECONOMY AND GENERATES A MORE EFFICIENT ALLOCATION OF SOCIAL AND ECONOMIC RESOURCES

In enacting legislation which provides for recovery of damages in our courts for product disparagement, the state and federal governments stand between those who can provide information about products and services and those who need information.

A concern for the chilling of the press (because differences of opinion are too often transmuted and take the form of defamation lawsuits) prompted the addition of the element of actual malice to defamation causes of action filed by public officials, public figures, and limited purpose public figures against publishers, broadcasters and all other speakers. See New York Times v. Sullivan, 376 U.S. 254 (1964), Curtis Publishing Co. v. Butts, 388

U.S. 130 (1967) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 352 (1974).

Without becoming unduly ensnared in a lengthy discussion of the facts in this case, it is worth noting that, after 12 years of litigation, the dispute centers, finally, on a slip of a preposition, a distinction between Consumer Reports' expressed impression that sound heard from the petitioner's audio speakers wandered "about the room" (or "around the room"), rather than "along the wall". 4/ One wonders if this is the stuff of actual malice. If this is an example of known falsity of the facts, or reckless disregard for the true facts (New York Times v. Sullivan, supra at 280, Gertz v. Robert Welch, Inc., supra, at 328), then this case presents the stuff of a publisher's nightmare and, no doubt, a defamation

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4/ Doubtless, one tenth of the money spent by Petitioners on this litigation would have financed an exquisite advertising campaign for the stereo components at issue herein.

lawyer's dream. In that event, consumers may anticipate a dangerous hush in the marketplace of ideas about these and, perhaps, other matters.

Without both the actual malice standard, and the strict scrutiny standard of review, with the corollaries of independent review of the evidence for clear and convincing evidence of actual malice, a variety of salutary mechanisms are at risk. Marketplace commentary and consumer reporting assure that a consumer can, in some instances, prevent economic and personal injury before it occurs.

Furthermore, consumers who seek information from as many sources as are available before purchasing are less likely to resort to the courts to obtain compensation for losses resulting from products and services. The reduced likelihood of litigation and the more efficient allocation of social, as well as economic, resources are benefits which cannot be lightly cast aside.

IV

THE INDEPENDENT REVIEW OF THE EVIDENCE RULE AND THE CLEAR AND CONVINCING EVIDENCE STANDARD ARE BUT APPLICATIONS OF THE GENERAL PRINCIPLE THAT GOVERNMENT ACTION WHICH IMPINGES UPON RIGHTS AND LIBERTIES SECURED BY THE FIRST AMENDMENT MUST BE SUBJECT TO AN EXACTING AND RIGOROUS OR STRICT JUDICIAL REVIEW

This Court has always scrutinized with care both legislative and judicial determinations which threaten liberties and rights secured by the first amendment. 5/ This Court has recently restated its commitment to the function of the first amendment as a bulwark "protecting a marketplace for the clash of different

5/ This has been the case particularly when the restraint or regulation is specifically directed to the content of speech. New York Times v. Sullivan, supra, at pages 269-270. Indeed, defamation laws and the enforcement of such laws are content based both by their terms, insofar as they seek to regulate defamation, and as applied, insofar as disputes about other matters are transported into the courtroom in the guise of defamation litigation.

views and conflicting ideas." Citizens Against Rent Control v. Berkeley, California, 454 U.S. 290 (1981). In that case, Chief Justice Burger wrote for the Court as follows:

> "Long ago this court admonished that with respect to the First Amendment, 'the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). This was but another way of saying that regulation of First Amendment rights is always subject to exacting judicial review." Id., at 294.

In New York Times v. Sullivan, supra, Justice Brennan introduced a discussion of the legal issues in that case as follows:

> "We may dispose at the outset of two grounds asserted to insulate the Alabama courts from constitutional scrutiny." Id., at 265 (emphasis added).

The Court then proceeded to analyze the two primary legal barriers erected by the plaintiff in that case to the constitutional arguments of the defendant, and concluded that absent proof of knowledge of the falsity of or reckless disregard for

the true facts, the Alabama libel laws were unconstitutional as applied. Id. at 283.

Since the Court had not ruled that Alabama's defamation legislation was unconstitutional on its face (regardless of how applied), the Court stated the law with respect to the level of scrutiny necessary to assure that finders of fact applying the New York Times v. Sullivan rule not stray from the constitutional line (proof of actual malice) drawn by the Court. Justice Brennan stated the principle as follows:

> "Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This court's duty is not limited to the elaboration of constitutional principles; we must also in such cases review the evidence to make certain that those principles have been constitutionally applied...." Id. at 284, 285 (emphasis added).

There are excellent reasons for a more searching study of governmental action which affects the exercise of first amendment rights and liberties, whether that action is

the adoption of a statute which is unconstitutional on its face, or an application by the courts of an otherwise constitutional law in an unconstitutional way.

First amendment issues sometimes arise in politicized and emotionally charged environments. The question of racial integration in the South was the backdrop for the civil libel litigation which culminated in the New York Times v. Sullivan decision. A dispute about land use planning set the stage for litigation which led to the decision in Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

Questions about product quality are often very politically charged today. There are long periods of time during which questions about safety may be scientifically unresolved and subject to dispute. Often, members of the public would not knowingly choose to take the risks associated with such products, while the firms that produce

the products have, in some instances, been more sanguine about safety than a disinterested third party might be.

Whenever the media raise questions about the safety of any particular product, it is increasingly likely that someone will sue, no matter how careful the reporting, and perhaps even if the litigation is groundless. Such disputes are fertile ground in which the seeds of disagreement and anger can germinate and bear that usually bitter and expensive fruit, defamation litigation.

For many reasons, the record must be carefully examined in each and every case in which action by any branch of government has placed first amendment rights in jeopardy.

The cases cited by the Court in New York Times v. Sullivan, supra, at 285, as well as those which have followed it, demonstrate a wide variety of contexts in which the ability of an appellate court to engage in an independent review of the evidence has played a role in preserving

freedom of speech and press. The most recent restatement of this constitutional principle, and its application to preserve our first amendment freedoms, appears in NAACP v. Claiborne Hardware, __ U.S. __, 73 L.Ed.2d 1215, 1238 n. 50, and 1245-1246 (1982).

Older cases demonstrate the role of the constitutional rules as well. Fiske v. Kansas, 274 U.S. 380 (1927), for example, demonstrates the tale a "cold" record can tell. Fiske v. Kansas would be decided today on first amendment grounds. (See Brandenberg v. Ohio, 395 U.S. 444 (1969), in which the Court held, per curiam, that the Ohio Criminal Syndicalism Act could not be enforced against a peaceful gathering of the Ku Klux Klan; the Court held the statute unconstitutional both on its face and as applied.)

In 1927, in Fiske v. Kansas, supra, the fourteenth amendment liberty interest provided the basis for reversal of the Kansas courts' enforcement of the Kansas

Criminal Syndicalism Act. 6/ The criminal charges filed against Mr. Fiske reproduced, verbatim, quotations from pamphlets he was handing out and alleged that Mr. Fiske had violated the act by attempting to persuade people to join a labor union which was a branch of the Industrial Workers of the World. The written material that he was giving people included unpopular rhetoric about the relationship of labor and capital but no advocacy of violence.

At the trial, the state offered only the written material and Mr. Fiske's own testimony which was reviewed by the Court. Id., at 383. Neither the written material nor Mr. Fiske's testimony established that Mr. Fiske had engaged in advocacy which would have violated Kansas law. There was no other evidence put forth with respect to Mr. Fiske's advocacy.

6/ The Kansas Criminal Syndicalism Act provided penalties for the expression of doctrines which advocated violence and destruction of property to effect political change.

The jury nonetheless found, beyond a reasonable doubt, that Mr. Fiske was guilty and should go to jail for what he had said. The Supreme Court of Kansas, reading the record as a whole, upheld the verdict on the ground that since the language of the written material and the testimony of Mr. Fiske were open to interpretation, the jury could choose not to believe Mr. Fiske's testimony. Thus, the Kansas Supreme Court held:

> "'There was room for them to find as their verdict shows they did, that the equivocal language of the preamble, and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state.'" Id., at 385.

Because the statute was a statute of general scope enforced in a particular situation over a timely objection that such enforcement was unconstitutional (i.e., because the statute was assertedly unconstitutional as applied), the United States Supreme Court restated the progenitor

of the rule at issue herein. Id., at 385, 386. 7/

When the United States Supreme Court analyzed the record of the Kansas trial, the Court reached quite a different conclusion. The Court held:

> "No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety or expedience of crime, criminal syndicalism, sabotage or other unlawful acts or methods. ... And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, the 'sinister meaning attributed to it by the state.'" Id., at 386 (emphasis added).

The Court held that the statute was unconstitutional as applied because no crime had been charged or proven. Id., at 386, 387.

7/ The independent review of the evidence rule was historically invoked whenever any federal right was asserted in a state court proceeding. See supra, at 2, n. 1. The scope of the rule has since both narrowed (to include constitutional rights, and especially first amendment rights) and broadened (to include findings made in federal courts). New York Times v. Sullivan, supra, at 284, 285 and cases cited therein.

Since there was no direct evidence to support the Kansas jury's conclusion, one can speculate that the findings of fact in that case were the product of the jury's belief that anyone who believed in the ideas advocated by Mr. Fiske would also, of necessity, believe and advocate that those ideas should be made manifest through violent means even though the record did not support such a conclusion. In effect, the United States Supreme Court ruled that the uncorroborated inference (the product of the fact finder's disbelief of Mr. Fiske's testimony) could not support a judgment which impinged on constitutional rights.

Without an independent review of the evidence, permitting an appellate court to "make an independent examination of the whole record" (Edwards v. South Carolina, 372 U.S. 229, 235 (1963)), the Court, in Fiske and in many other cases, would have been unable to prevent both substantial injustice and an evisceration of the constitution.

In the case now before this Court, the difference between the trial court's ruling and that of the court of appeals turns, finally, on the inference which the trial court was willing to draw from the evidence in respect to actual malice, based on the fact finder's view of the testimony given by Mr. Seligson of Consumers Union. The court of appeals found that normal editorial procedures were followed and decided that:

> "The most we can conclude from this is that in reviewing the manuscript CU employees could have inquired more painstakingly into the precise langage being used." Bose Corporation v. Consumers Union of United States, Inc., 692 F.2d 189, 197 (1st Cir. 1982).

The trial court, on the other hand, decided that actual malice was established largely because:

> "Seligson is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning." Bose Corporation v. Consumers Union of United States, Inc., 508 F.Supp. 1249, 1276, 1277 (D.Mass. 1981).

Thus, the ultimate finding of actual malice turns upon an inference about which the trial court and court of appeals differed with respect to the relative weight and meaning of the evidence about Consumer Report's editorial procedures and the state of mind of the person who wrote the article. 8/

In New York Times v. Sullivan, supra, at 285, 286, the Court ruled that a reviewing court can, should and must intrude on the province normally reserved for the finder of fact in order to assure that finders of fact do not, as the trial court did in the case at bar, accord too little weight to constitutional considerations. Rule 52(a) cannot provide a sufficiently searching scope of review.

In Inwood Laboratories, Inc. v. Ives, 456 U.S. 844 (1982), a trademark infringement action in which constitutional consider-

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8/ Amicus Curiae also supports the respondent and other amici who argue that New York Times v. Sullivan, supra, and its progeny control the substantive outcome herein in that the court of appeals, by focusing on the editorial procedures as a whole, properly applied the governing principles of law.

ations were not a factor, Justice O'Connor, writing for the Court, identifies as follows the more limited role which a reviewing court can play pursuant to Rule 52(a):

> "Each of those conclusions is contrary to the findings of the District Court. An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.' (Citation omitted)." Id., at 857, 858.

The Court in that case held that the court of appeals had erred in its application of Rule 52(a) by setting aside findings of fact that were not clearly erroneous. Id. at 858.

When the issue at stake is not a constitutional one, perhaps there is some margin for possible, but not clear, error. When the question is whether constitutional rights and liberties have been adequately protected, an appellate court cannot perform a role in assuring that protection if it cannot chart its course across the record,

with the constitutional rights to free speech and press as its lodestar, and (to recast the language of the Court in Inwood Laboratories, Inc.) consider whether to give the facts a different construction, resolve ambiguities differently, and find a more sinister cast, if such there is, to a fact finder's (government) action which has placed constitutional rights and liberties at risk even though that fact finder has deemed its own action innocent. See, e.g., Fiske v. Kansas, 274 U.S. 380 (1927) and discussion, supra, pp. 22 to 26; Bridges v. California, 314 U.S. 252 (1941).

V

THIS COURT SHOULD NOT CARVE OUT A SMALL GROUP OF PUBLISHERS FOR SPECIAL TREATMENT AND SEGMENT THE MEDIA BY PROVIDING A LOWER LEVEL OF CONSTITUTIONAL PROTECTION IN PRODUCT DISPARAGEMENT CASES

This Court recently held in Minneapolis Star and Tribune v. Minn. Com'r

of Rev., __ U.S. __, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) that the State of Minnesota's imposition of a special use tax on paper and ink could not be constitutionally upheld because the tax applied only to the press, and, therefore, could burden rights protected by the first amendment.

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Court stressed the fact that publishers and the media are the most vulnerable defendants in defamation actions because they serve as mass communicators. Justice Brennan wrote:

> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." Id. at 278.

The words are no less true today.

The tax in Minneapolis Star and Tribune was further unconstitutional on first amendment grounds because the statutory scheme creating the tax exempted from taxation the first $100,000 of paper and ink purchases. Many smaller publica-

tions did not pay the tax. Justice O'Connor wrote at 75 L.Ed.2d 295, 309:

> "The State explains this exemption as part of a policy favoring an 'equitable' tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota could justify the scheme." (emphasis added.)

In Minneapolis Star and Tribune v. Minn. Com'r of Rev., the Court's concern was that the press could be taxed to death. In New York Times v. Sullivan, supra, the concern was that the press would be sued to death.

The risks identified by the Court in Minneapolis Star and Tribune and in New York Times v. Sullivan are identical insofar as the enforcement of tax laws, like the enforcement of the laws which establish and define a cause of action for defamation, has the potential of inhibiting free speech and press, thus preventing communication. The

practical result is today even more likely in the defamation litigation context than it is in the taxation context.

These risks are not hypothetical. More than one mass communicator has already withdrawn from aggressive investigative reporting as a result of the threat and actuality of such resource draining litigation. See "How Libel Suit Sapped The Crusading Spirit Of A Small Newspaper," The Wall Street Journal, September 29, 1983, at 1, col. 1.

If the Court rules that in a product disparagement case, unlike other defamation cases, Rule 52(a) can constitutionally control the scope of appellate review when the presence or absence of full constitutional protection turns upon a finding of fact, the proximate result will be even more litigation for the media and publishing communities. The ultimate effect will be publishers who publish less and too cautiously, some who disappear altogether, and some who choose not to publish at all.

VI

CONCLUSION

Consumer Reports is a self-help journal for consumers. It is published by a non-profit corporation which is financed by and composed of consumers. Consumer Reports performs a unique public service. Without the protection of the first amendment, this private provider of public service, and others, will be buried in the detritus of defamation lawsuits.

We ask this Court, the ultimate arbiter of constitutional law, to scrupulously avoid sacrificing "the effective administration of justice" (New York Times v. Sullivan, supra) for efficiency in the administration of justice.

The solicitude for the first amendment and its role in protecting unfettered communication that has been expressed in the

recent decisions of this Court exemplifies one of the important functions of the Court, that of assuring that the first amendment continues to serve as a foundation for the rights and liberties upon which our nation, our economy and our society have prospered.

The decision of the Court of Appeals for the First Circuit should be affirmed.

Dated: October ___, 1983.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

State of California)
) ss.
County of Sacramento)

I, Eleanor Lusetti, being duly sworn, state:

All parties and amici appearing have been served with three copies each of attached Motion and Brief Amicus Curiae of Marie Shibuya-Snell, Director of the California Department of Consumer Affairs. Said service was accomplished by depositing said documents in a United States mailbox on October ___, 1983, with first-class postage prepaid, and addressed to the attorneys of record for said parties and amici as follows:

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_____
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Subscribed and sworn to before
me on October ___, 1983.

_____

No. 82-1246-CFX
Status: GRANTED

Docketed:
January 20, 1983

Title: Bose Corporation, Petitioner
v.
Consumers Union of United States, Inc.

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Hieken, Charles

Counsel for respondent: Pollet, Michael N.

Entry	Date	Note	Proceedings and Orders
1	Jan 20 1983	G	Petition for writ of certiorari filed.
2	Jan 20 1983		Appendix of petitioner Bose Corp. filed.
3	Feb 10 1983		Petitioners letter in compliance with Rule 28.1 filed.
5	Feb 10 1983		Order extending time to file response to petition until March 24, 1983.
6	Mar 26 1983		Brief of respondent Consumers Union of U.S., Inc. in opposition filed.
7	Mar 29 1983		Reply brief of petitioner Bose Corp. filed.
8	Mar 30 1983		DISTRIBUTED. April 15, 1983
10	Apr 18 1983		REDISTRIBUTED. April 22, 1983
11	Apr 25 1983		Petition GRANTED.
			**********
12	Jun 8 1983		Joint appendix filed.
13	Jun 8 1983		Brief of petitioner Bose Corp. filed.
14	Jun 18 1983		Record filed.
15	Jun 18 1983		Certified original record & C.A. proceedings, 3 boxes received.
16	Jul 13 1983	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
17	Jul 13 1983	G	Motion of The New York Times Company, et al. for leave to file a brief as amici curiae filed.
18	Jul 15 1983	X	Brief of respondent Consumers Union of U.S., Inc. filed.
20	Jul 22 1983		Opposition of petitioner to motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
21	Aug 4 1983		CIRCULATED.
22	Aug 23 1983		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
23	Aug 23 1983		Motion of The New York Times Company, et al. for leave to file a brief as amici curiae GRANTED.
24	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 8, 1983. (4th case) (1 hour)
25	Oct 24 1983	D	Motion of Marie Shibuya-Snell, Director of the California Department of Consumer Affairs, for leave to file a brief as amicus curiae, out-of-time, filed.
26	Oct 28 1983	X	Reply brief of petitioner Bose Corp. filed.
28	Oct 31 1983		Motion of Marie Shibuya-Snell, Director of the California Department of Consumer Affairs, for leave to file a brief as amicus curiae, out-of-time, DENIED.
29	Nov 8 1983		ARGUED.